LIBRARY
SUPREME COURT, U. S.

FILED
DEC 6 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 888

LOCALS 107, 312, 331, 384, 470, and 676, Affiliated With the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioners,

vs.

A. DUIE PYLE, INCORPORATED, A. E. F. TRANSPORTATION, INCORPORATED, and NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Third Circuit.

DAVID PREVIANT
211 West Wisconsin Avenue,
Milwaukee, Wisconsin 53203,
Counsel for Petitioners.

Of Counsel:
EDWARD DAVIS
215 South Broad Street,
Philadelphia 7, Pennsylvania,
FLORIAN BARTOSIC
25 Louisiana Avenue, N. W.,
Washington, D. C. 20001,
JOHN S. WILLIAMSON, JR.
ALAN M. LEVY
211 West Wisconsin Avenue,
Milwaukee, Wisconsin 53203.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
A. Proceedings before the National Labor Relations Board	5
B. Proceedings in the Court Below	6
Reasons for Granting Certiorari	7
Appendices:	
A. Opinion of the United States Court of Appeals for the Third Circuit	1a
B. Decision and Order of the National Labor Relations Board	12a
C. Section 8 (e) of National Labor Relations Act (29 USC 158 (e))	55a

Cases Cited.

American Federation of Musicians v. Carroll, Docket No. 309, cert. granted October 9, 1967	8
American Trucking Assns. v. United States, 344 U. S. 298	8
Bakery Wagon Drivers Local 484 v. NLRB (D. C. Cir. 1963), 321 F. 2d 353	11
Bowman Transportation, Inc., 142 NLRB 1093	9

Dixie-Ohio, 17 M.C.C. 735; Ex parte M. C. 43, 52 M.C.C. 695 9

Fibreboard Paper Products Corp. v. N. L. R. B., 379 U. S. 203 ..... 8, 10

Local 20, International Brotherhood of Teamsters v. Morton, 377 U. S. 252 12

Local 24, International Brotherhood of Teamsters v. Oliver, 358 U. S. 283 and 362 U. S. 605 ..... 2, 3, 4, 7, 8, 9, 12

Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U. S. 676, at 690, n. 5 10

Manpower, Inc., 164 NLRB No. 37 9

Meat and Highway Drivers, Local 710 v. NLRB (Wilson and Co.) (D. C. Cir. 1964), 335 F. 2d 709 ..... 11, 12

National Freight Company, 146 NLRB 144 9

National Woodwork Manufacturers Assn. v. NLRB, 386 U. S. 612, at 635-636 ..... 7, 9, 10, 11, 12

NLRB v. Hearst Publications, Inc., 322 U. S. 111 ... 11

United Insurance Co. of America v. NLRB, Docket No. 178, cert. granted October 9, 1967 8

United States v. Drum, 368 U. S. 370 8

United Auto Workers v. N. L. R. B. (General Motors) (D. C. Cir. 1967), 381 F. 2d 265, cert. denied Oct. 9, 1967, Docket No. 316 ..... 10, 12

Western Nebraska Transport Service, 144 NLRB 301 9

Statutes Cited.

26 U. S. C. 401-402, 501 (a) 9

29 U. S. C. 158 (e) 2, 5

29 U. S. C. 186 (c) 9

Interstate Commerce Commission's Rules and Regulations, Sec. 207.4 (a) (4) 4

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. .....

LOCALS 107, 312, 331, 384, 470, and 676, Affiliated With the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioners,

vs.

A. DUIE PYLE, INCORPORATED, A. E. F. TRANSPORTATION, INCORPORATED, and NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Third Circuit.

Petitioners, Locals 107, 312, 331, 384, 470, and 676, each affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on the 11th day of September, 1967. That judgment reversed an order of the National Labor Relations Board dismissing a charge of unfair labor practices filed against Petitioners.

OPINIONS BELOW.

The opinion and judgment of the Court below are unreported and are printed in Appendix "A", *infra*, pages 1a-11a. The decision and order of the National Labor Relations Board (159 NLRB No. 1) are unreported and are printed in Appendix "B", *infra*, pages 12a-54a.

JURISDICTION.

The judgment of the court below was entered on the 11th day of September, 1967. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTION PRESENTED.

Whether Section 8(e) of the National Labor Relations Act prohibits contract clauses which are virtually identical to those before this Court in *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U. S. 283 and 362 U. S. 605, and which require that only bargaining unit employees drive equipment leased to the carriers who are party to the contract.

STATUTE INVOLVED.

The statutory provision involved is Section 8(e) of the National Labor Relations Act, as amended, 29 U. S. C. 158(e), and is printed in Appendix "C", *infra*, p. 55a.

STATEMENT.

In 1963, Local Teamster Unions Nos. 107, 312, 331, 384, 470 and 676 (hereinafter Union), all in the Philadelphia area, entered into a single collective agreement covering

a multi-employer unit established under past agreements and comprised of the employees of 84 carriers engaged in local cartage and over-the-road trucking under the authority of the Interstate Commerce Commission or the State Motor Authority (R. 26a-27a).[1] Respondents, A. Duie Pyle, Inc., and A. E. F. Transportation, Inc., are carriers in this bargaining unit (R. 27a, 39a).

Earlier agreements among these parties, as well as this 1963 agreement, contained valid union security provisions covering all employees working within this bargaining unit (R. 106a-107a).

The carriers have been using their own equipment as well as that driven by owner-operators and drivers for fleet owners, to carry on their regular local and over-the-road trucking business (R. 28a). These owner-operators and fleet owners do not have licenses, permits or certificates which would allow them to operate in interstate commerce except while driving for the carriers in the bargaining unit (R. 26a).

In 1963, for the first time, the parties also agreed to new provisions patterned after, and virtually identical to, those which were before this Court in *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U. S. 283 and 362 U. S. 605 (R. 32a-33a). These provisions covered the carriers' use of "owner-operators" and "fleet-owners"—persons who own, and, in the case of owner-operators, drive equipment leased to the carrier in the bargaining unit.[2]

---

[1] References to "R" are to the Joint Appendix filed with the court below and certified hereto by the Clerk of such court.

[2] The Record to which the parties stipulated defined an "owner-operator" as "a person who owns either a truck-tractor or a truck-tractor and trailer and who leases the truck-tractor either with or without a truck-trailer to a carrier to be used for the transportation of various commodities by the Carrier under the authority of ICC or State Motor Authority, if any, and who then also drives and

Briefly stated, the challenged clauses[3] require that all equipment used by a unit carrier, whether owned or leased, must be driven by an employee of that carrier. Thus, owner-operators who wished to drive their equipment while it was leased could do so by becoming employees of their carrier-lessee, working under the terms and conditions, including wages and seniority rights, established for all that carrier's drivers.

More specifically, Section 4 of Article 23 provided that in all cases hired or leased equipment had to be operated by an employee of the certificated or permitted carrier and expressly reserved to the carrier "the right to control the manner, means and details of, and by which, the owner-operator performs his services, as well as the ends to be accomplished"—provisions similar to those found in the Interstate Commerce Commission's Rules and Regulations, Sec. 207.4(a)(4). In addition, to assure enforcement of the wage and benefit structure, the Article also set minimum rentals for the equipment driven by owner-operators and leased to unit carriers, a protective device approved by this Court in *Oliver*, 358 U. S. at 293-294.

These clauses were, at the time, found in trucking industry contracts covering more than 5,000 employers and over 150,000 employees in some 43 states (R. 29a-

---

operates such equipment in the transportation of such commodities for the Carrier.

"(a) Occasionally the owner-operator may provide a substitute driver to operate his equipment in the transportation of such commodities for the carriers."

A "fleet-owner" was defined as one who "owns one or more truck-tractors, and leases such truck-tractors to one or more Carriers with or without drivers, for the purpose of transporting various commodities for the Carrier" (R. 26a).

[3] Though the Agreement covers local or city cartage and over-the-road hauling, it is, for convenience, printed as two separate contracts. The clauses are found in Article 23 of the over-the-road contract and Article 24 of the city cartage contract (R. 71a-80a).

31a).[4] A substantial number of the carriers bound by these other contracts operated in the Philadelphia area (R. 31a).

At the time these clauses were negotiated, unit employees, non-unit owner-operators, and non-unit drivers for fleet owners were engaged in local cartage and over-the-road trucking, all transporting the same commodities, exercising the same skills requiring the same job qualifications, and operating out of, or directed from, the same terminals. Certain unit employees also owned the equipment they drove; others drove leased equipment (R. 28a-29a).

Essentially then, the challenged clauses prevented the carriers party to the collective agreement from continuing to use non-unit personnel to perform the local cartage and over-the-road trucking work covered by their contract and traditionally done by unit employees, but permitted them to continue to lease equipment if they used their own employees to drive it.

A. Proceedings before the National Labor Relations Board.

Upon execution of the collective bargaining agreement containing these contract clauses, a number of employers who were party to the agreement filed charges with the National Labor Relations Board alleging that such contract clauses were in violation of Section 8(e) of the Act. Thereafter the General Counsel issued his complaint and joined in an all-party stipulation of facts. On this record

---

[4] Since then, these (or similar) clauses have become part of the National Master Freight Agreement covering approximately 8,000 employers and 450,000 employees (N. Y. Times, May 6, 1967, at 36, col. 2 (City ed.); N. Y. Times, Feb. 16, 1967, at 20, col. 4 (City ed.)).

the Board considered the briefs of the parties and made its decision and order dismissing the charges.

The Board found that the work of the drivers of leased equipment was "sufficiently comparable in character, and the terms under which it is done sufficiently affect the terms and conditions of the work done in the unit, to cause the Union to have a direct and necessary interest in the work" (33a, *infra*). The Board rejected the argument that the "cessation in business relationships" which might result from application of these clauses affected their legality. Adoption of this argument, it concluded, would mean that "once work had been subcontracted it could never be considered to be unit work because it would disrupt business relationships to require the employer to cease doing business with its subcontractors" (34a, *infra*). Relying on the *Oliver* cases, the Board stated:

> "The Unions' goal, and the thrust of the clause in question, is to assure the performance of unit work by unit employees in accordance with the terms and conditions set out in the Unions' contracts with the employers governing the greater part of the work performed and controlled from their respective locations" (35a, *infra*).

B. Proceedings in the Court Below.

Upon Petition for Review, the Court of Appeals for the Third Circuit affirmed in part and reversed in part. It found that the Union had a right to bargain for contract language which required all persons driving for the carriers to receive wages and benefits equal to those paid unit employees, but not the right to bargain for language which would require that all unit work be performed by employees if the new employees were required to become union members. Accordingly, the Court sustained those provisions dealing with wages, working conditions, and

minimum equipment rentals, but rejected the provisions requiring that all leased equipment be driven by bargaining unit employees. This conclusion was based on the Court's judgment that the provisions which required drivers of leased equipment to receive the equivalent of Union negotiated wages and economic benefits, standing by themselves, effectively protect "against substandard competition, which might be an incentive for an employer to deprive his unionized employees of work," (8a, *infra*); that, therefore, the requirement that drivers of leased equipment become employees, together with the incidental application of the contract's valid, long-established union security clause establishes a prohibited "secondary" objective.

Reasons for Granting Certiorari.

In *Local 24, International Brotherhood of Teamsters v. Oliver,* 358 U. S. 283, decided in January, 1959, this Court held that virtually the same contract clauses here involved constituted an "agreement upon a subject matter as to which federal law directs [the parties] to bargain," 358 U. S. at 295; and that, because they had the primary purpose of protecting working standards, these provisions were beyond the reach of state anti-trust laws, 358 U. S. at 295-297.

Shortly thereafter the Congress undertook extensive revisions of the National Labor Relations Act, motivated in part by claims that the International Brotherhood of Teamsters had been seeking to gain its primary goals by contract clauses applying secondary pressures. The enactment of Section 8 (e) was the Congressional response to these alleged "hot cargo" abuses. *National Woodwork Manufacturers Assn. v. NLRB,* 386 U. S. 612, at 635-636. Yet nowhere in the committee reports or congressional debates was there any reference to the *Oliver* case or a criticism of the particular contract clauses there involved.

This Court has, therefore, acted consistently with this legislative history when it has continued to cite *Oliver* with approval. Thus, in *Fibreboard Paper Products Corp. v. NLRB,* 379 U. S. 203, 213, it was held that "the only difference between that case [*Oliver*] and the one at hand is that the work of the employees in the bargaining unit was let out piecemeal in Oliver, whereas here the work of the entire unit has been contracted out."

As this Court pointed out in *Oliver, supra,* the problem of protecting bargaining unit work in the trucking industry had a long and troubled history. The clauses regulating the use of owner-operators, and prohibiting non-unit personnel from driving equipment (including leased equipment) in the service of the employer, resolved the conflict between the carrier's need to augment his equipment and drivers by leasing equipment and using owner-operators (or the drivers of leased fleet equipment) and the union's need to establish and protect decent working conditions and preserve work opportunities for drivers in the trucking industry.[5] These clauses are, in this Court's words, "a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract," *Oliver,* 358 U. S. at 294; see also: Brief for the Respondent, NLRB to the court below, pp. 27-28.

---

[5] The problems of work protection for unit employees against the undermining competitive effects of independent contractors are presently before this Court in a different context in *American Federation of Musicians v. Carroll,* Docket No. 309, cert. granted October 9, 1967, in which it is argued that the principles set forth in *Oliver* have great significance in "not only musical club dates, but also trucking, the building trades, the garment industry and numerous others where employers work at the trade." Petitioners Reply Brief, p. 2. Other questions of employees and independent contractors are presented in *United Insurance Co. of America v. NLRB,* Docket No. 178, cert. granted October 9, 1967. Related matters in the trucking industry were also considered by this Court in *United States v. Drum,* 368 U. S. 370, and *American Trucking Assns. v. United States,* 344 U. S. 298.

However, the court below treated as severable those provisions of the contract which this Court, in *Oliver*, treated as a single solution to a difficult problem. The provision establishing wages and working conditions of owner-operators simply affirms their employee status. The provision establishing minimum rental for use of equipment driven by the owner-operator prevents the erosion of his wages as an employee. But neither of these provisions was intended to apply separately from the provision that all unit work must be performed by employees within the unit. That is the heart of the solution. These provisions do not provide for the conditions under which independent contractors shall perform unit work. They reserve such unit work to employees in the unit, and provide for the conditions under which a certain type of employee (the owner-operator) shall perform this work. Indeed, this Court stated in the second *Oliver* case that the provision requiring even the fleet owner to become an employee when he drove leased equipment was "at least as intimately bound up with the subject of wages as the minimum rental provisions . . ." *Oliver*, 362 U. S. 605-606.[6]

Because of the failure to recognize this basic point, the decision below not only threatens the continued use

---

[6] Even in the absence of contract, the National Labor Relations Board has frequently held that owner-operators and drivers for fleet owners are bargaining unit employees subject to the carrier's relations with the bargaining representative of the drivers of its own equipment. *National Freight Company*, 146 NLRB 144; *Bowman Transportation, Inc.*, 142 NLRB 1093; *Western Nebraska Transport Service*, 144 NLRB 301; *Manpower, Inc.*, 164 NLRB No. 37. Similarly, the Interstate Commerce Commission has held that carriers are responsible for the acts and work of owner-operators driving for their lessee. *Dixie-Ohio*, 17 M.C.C. 735; *Ex parte M. C. 43*, 52 M.C.C. 695. In addition, there are special problems of requiring adherence to wage structures and benefit plans because it is unlawful for owner-operators to participate in the contract's insurance and pension programs unless they are employees. 29 U. S. C. 186(c); 26 U. S. C. 401-402, 501(a).

of these clauses in the thousands of situations in which they are now applicable, but may well lead to grave industrial strife in the transportation industry by causing a revival of the conditions which originally led to their adoption. Hence, the court below, contrary to this Court's reaffirmation of *Fibreboard Paper Products Corp. v. N. L. R. B.*, 379 U. S. 203, in *National Woodwork, supra*, at 642, has interpreted "Section 8(e) to invalidate clauses . . . which have been successfully incorporated through collective bargaining in major labor agreements" and to frustrate "Congress' deep commitment to the resolution of matters of vital importance to management and labor through the collective bargaining process." Ibid at 649 (Harlan, J., concurring).

In short, the Court of Appeals, in reversing the Board, adopted a theory totally at odds with this Court's specific approval of the *Oliver* clauses as an appropriate solution to problems which have a direct "impact on the product market and the interests of union members." *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U. S. 676, at 690, n. 5.

Because the court below misunderstood *Oliver*, it failed to grasp the crux of the Board's decision—that the Union had a legitimate primary interest in reclaiming for the bargaining unit the local cartage and over-the-road driving work which the Carriers had diverted to non-unit personnel, as well as in protecting against erosion that portion of the work which the Carriers' employees were performing at that time (R. 27a, 39a). That this would lead to an expansion in the amount of work and the number of employees in the bargaining unit makes the union's interest no less primary (35a-37a, *infra*). *United Auto Workers v. N. L. R. B.* (*General Motors*) (D. C. Cir. 1967), 381 F. 2d 265; cert. denied Oct. 9, 1967, Docket No. 316.

Unlike the Court of Appeals here, the Court of Appeals for the District of Columbia Circuit has held that when a union is concerned with work which is "fairly claimable" because of its similarity to, and historic derivation from, unit work, it may "recapture" this work for the unit through collective bargaining even though the precise work involved had never been done by unit employees.

> "Activity and agreement which directly protects fairly claimable jobs are primary under the Act. Incidental secondary effects of such activity and agreement do not render them illegal." *Meat and Highway Drivers, Local 710 v. NLRB (Wilson and Co.)* (D. C. Cir., 1964), 335 F. 2d 709, 713.

In coming to its conclusion, the court below erroneously treated the challenged clauses as both requiring the owner-operators to become employees (and hence union members) and as permitting them to remain independent contractors:

> "The parties here, however, carefully refrained from prohibiting subcontracting and the provision requiring that the subcontractees become employees and join the union must therefore be judged as it was written and not as if it were a different case completely prohibiting all subcontracting" (10a, *infra*).

But, as Section 2(3) of the Act makes clear, subcontractors and employees are mutually exclusive categories. Cf. *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111. Therefore, by agreeing that only the carrier's own employees may drive his equipment, the parties did more than limit the scope of subcontracting; they completely prohibited all subcontracting—"a legitimate device to protect the economic integrity of the bargaining unit." *Bakery Wagon Drivers Local 484 v. NLRB* (D. C. Cir. 1963), 321 F. 2d 353, 357.

Where, as here, the collective agreement creates a system designed for the preservation and reclamation of bargaining unit work, the contractual relationship falls under the same protective policies which this Court approved in *National Woodwork, supra.*

Finally, the practical effect of the lower court's concern with the application of a union security provision to persons who become employees is to make the legality of the clauses under Section 8 (e) turn upon the various state laws on union security, a result clearly out of harmony with the Congressional intent to achieve a uniform national policy concerning the "primary-secondary" dichotomy (*Local 20, International Brotherhood of Teamsters v. Morton,* 377 US 252), and peculiarly inappropriate for an industry whose employees constantly cross and recross state lines, working in the nation's thirteen right-to-work states, as well as in those states where union security provisions are lawful. Thus the court below has rejected a collectively negotiated solution to a basic labor problem by focusing on an incidental provision which varies from state to state instead of being guided by the national policies which were designed to protect the activity and agreement of the Union.

In sum, the decision below is disruptive of a widely applied collectively negotiated solution to a vital and difficult problem in the trucking industry; frustrates the Congressional intent to permit this type of solution; blurs the distinction between employees and subcontractors on which the primary-secondary dichotomy has developed; unjustifiably limits the scope of bargaining unit work protection to that precise amount of work presently being performed by bargaining unit employees; makes legality under Section 8 (e) dependent upon state law; and conflicts with this Court's decisions in the *Oliver* cases and *National Woodwork,* as well as the *Wilson* and *Auto Workers* decisions of the District of Columbia Circuit.

The decision below, therefore, raises most important questions under national labor policy which only this Court can clarify and resolve.

For the reasons stated, this petition should be granted.

Respectfully submitted,

DAVID PREVIANT
211 West Wisconsin Avenue,
Milwaukee, Wisconsin 53203,
Counsel for Petitioners.

Of Counsel:

EDWARD DAVIS
215 South Broad Street,
Philadelphia 7, Pennsylvania,

FLORIAN BARTOSIC
25 Louisiana Avenue N. W.,
Washington, D. C. 20001,

JOHN S. WILLIAMSON, JR.
ALAN M. LEVY
211 West Wisconsin Avenue,
Milwaukee, Wisconsin 53203.

APPENDIX A.

United States Court of Appeals
For the Third Circuit.

No. 16010

A. Duie Pyle, Incorporated,
A. E. F. Transportation, Incorporated,
Petitioners

v.

National Labor Relations Board,
Respondent

Local 107, Local 384, Local 470, Local 312, Local 331 and Local 676 Each Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Intervenors

On Petition for Review of an Order of the
National Labor Relations Board

Argued March 7, 1967
Before McLaughlin, Hastie and Freedman, *Circuit Judges*

Opinion of the Court

(Filed August 15, 1967)

Freedman, *Circuit Judge*:

This is a petition to review a decision and order of the National Labor Relations Board that certain provisions

of a collective bargaining agreement dealing with subcontracting did not violate the hot cargo proscription of the Landrum-Griffin Act, which added § 8(e) to the National Labor Relations Act.[1]

Petitioners are common carriers and as members of a multiemployer bargaining association are parties to a collective bargaining agreement with local unions affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The agreement contains a number of provisions dealing with carrier subcontracts to individuals who own and operate truck-tractors and tractor-trailers. An owner who operates his own equipment is known as an owner-operator, and an owner who has more than one piece of equipment and employs one or more drivers is known as a fleet-owner. The subcontracting arrangements are carried out by a lease of the equipment which also includes the services of the driver. Since the subcontractees do not have the requisite permits they may transport goods in interstate commerce only while working for certificated interstate carriers such as petitioners.

The 1963 collective bargaining agreement, the one before us, contains detailed regulations of the treatment of owner-operators and fleet-owners, including the setting of minimum wages and minimum lease rentals and provision for seniority rights, insurance and the sale of equipment at its true value.[2] It expressly states that its object is to assure the payment of union wage scales and to prevent their circumvention through reduction of wage scales in the guise of absorption of loss from the operation of equipment.[3] Another provision of the agreement,

---

[1] 29 U. S. C. 158(e).

[2] Article 24 of the Over-the-Road Agreement.

[3] Article 24, § 16.

not in question here, requires that no work presently performed by or later assigned to the bargaining unit shall be subcontracted unless all regular employees are working.[4] A related provision, also unchallenged, provides that the petitioners may not lease or hire outside equipment unless all of their available usable equipment is working, and bars the use of outside equipment while regular employees are on layoffs.[5] A final provision, which is the center of the present controversy and was newly added in 1963, requires that leased equipment must be operated in all cases by an "employee" of the carrier, who must be paid "pursuant to the terms" of the collective bargaining agreement, and that the employer shall reserve the right to control the manner, means and details by which the owner-operator performs his service, as well as the ends thereby accomplished.[6] It is undisputed that the newly added provision would change the status of non-unionized owner-operators and fleet-owners from independent contractors to employees and thus would require them to become union members because of the union security provision of the agreement.[7]

The Board concluded that the agreement did not violate § 8(e) and that the provisions here in question, providing in detail for the terms and conditions of employment of owner-operators and requiring employee status of them, were simply designed to protect unit work and standards from erosion by unregulated subcontracts to owner-operators and fleet-owners. It also decided that the requirement that the operators of all leased equipment must be employees was not invalid simply because it had the

---

[4] Article 33.

[5] Article 34.

[6] Article 1, § 2(c) and Article 24, § 4.

[7] Article 2, § 1(b).

incidental effect of requiring the subcontractees to become members of the union. *Highway Truck Drivers and Helpers, Local 107*, 159 NLRB No. 1 (1966). Petitioners, however, contend that the union in the guise of protecting legitimate rights of the bargaining unit has reached out to coerce the owner-operators and fleet-owners to become unionized on pain of losing their subcontracts. This they contend renders invalid under § 8(e) the provisions of the agreement, especially those requiring the subcontractees to become employees and thereby to join the union.

Section 8(e) makes it an unfair labor practice for a union and an employer to agree that the employer shall cease and refrain from handling, using, selling, transporting, or otherwise dealing in the products of another employer, "or to cease doing business with any other person." The Act declares invalid a provision made in violation of its prohibition.[8]

At the threshold of our inquiry is the question whether the agreement requires a cessation of business with the owner-operators and fleet-owners since by its terms it would permit them to retain the work if they became employees of the carrier and joined the union. The requirement that the owner-operators and fleet-owners must become employees of the carriers prohibits a carrier by implication from doing business with those who do not become its employees and thus requires it "to cease doing business" within the meaning of § 8(e). *General Teamsters', Warehousemen and Helpers' Union, Local No. 890,*

[8] The relevant portion of § 8(e) reads: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void. . . ." 29 U. S. C., § 158(e).

137 NLRB 641, 643-44 (1962).[9] It is no answer to say that if the subcontractees become employees and join the union the carriers will not be required to cease doing business with them. While it is true that not every incidental alteration in the relationship between the parties to the subcontract would rise to the extent of constituting an agreement to cease doing business, the provisions before us are so drastic in their impact on the continued relationship of the independent subcontractees with the carriers that they fall clearly within the area regulated by § 8(e).[10]

The scope of the prohibition of § 8(e), however, is not to be found in the literal meaning of its broad language, but rather in its history and the circumstances out of which it arose, all of which has recently been described authoritatively by the Supreme Court in *National Woodwork Manufacturers Association v. NLRB*, 386 U. S. 612 (1967). The Court there showed that § 8(e) was enacted to close a "loophole" in § 8(b)(4)(A), which the Court in the *Sand Door* case[11] had construed as permitting an employer to carry out voluntarily a hot cargo provision. Section 8(e) therefore made it an unfair labor practice merely to enter into such an agreement, which it declared void. The setting in which § 8(e) was adopted thus requires it to be construed in harmony with § 8(b)(4) and

---

[9] See also Local No. 825, International Union of Operating Engineers, 162 NLRB No. 155 (1967); Dan McKinney Co., 137 NLRB 649, 652 (1962).

[10] See Local 3, International Brotherhood of Electrical Workers, 140 NLRB 729, 730 (1963), enforced, 325 F. 2d 561 (2 Cir. 1963); cf. Retail Clerks Union Local 770 v. NLRB, 296 F. 2d 368, 372-73 (D. C. Cir. 1961). See also § 8(b)(4)(A), prohibiting secondary boycotts having as an object "forcing or requiring any employer or self-employed person to join any labor . . . organization. . . ." 29 U. S. C., § 158(b)(4)(A).

[11] Local 1976, United Brotherhood of Carpenters & Joiners of America v. NLRB, 357 U. S. 93 (1958).

this carried into § 8(e) the distinction made in § 8(b)(4) between so-called "primary" and "secondary" activities. *National Woodwork Manufacturers Association v. NLRB, supra; Houston Insulation Contractors Association v. NLRB,* 386 U. S. 664 (1967).[12] If the object of the agreement is to benefit the employees of the bargaining unit represented by the union, it is "primary" and in such event does not fall within the proscription of § 8(e), whereas if the object is the application of pressure on an outside employer in order to require him to accede to union objectives it is "secondary" and within the prohibition of § 8(e).[13] Thus, in the *National Woodwork Manufacturers* case, the Supreme Court upheld as "primary" a provision that no employer would handle prefabricated doors, because it sought only to preserve work which traditionally had been performed by members of the bargaining unit on the job site.

In the present case the union has a legitimate interest in the subcontracts of the work which its members have the capacity to perform. The danger which such subcontracts have posed to the job security of bargaining unit members was recognized by the Supreme Court in the *Oliver* cases, *Local 24, International Brotherhood of Teamsters v. Oliver,* 358 U. S. 283 (1959), and 362 U. S. 605 (1960). The Court there dealt with provisions which were virtually identical to those involved here and held that they were immune from attack under state antitrust law because of the exclusive federal jurisdiction over the subject matter of the agreement. The Court recognized that the conditions under which a carrier could lease the

---

[12] See generally, Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e), 113 U. Pa. L. Rev. 1000 (1965); Comment, Subcontracting Clauses and Section 8(e) of the National Labor Relations Act, 62 Mich. L. Rev. 1176 (1964).

[13] For the history of this distinction under § 8(b)(4) see Lesnick, The Gravamen of the Secondary Boycott, 62 Colum. L. Rev. 1363 (1962).

equipment of an owner-operator had been in dispute for many years and that the owner-operators' practice of accepting inadequate rentals for their vehicles had endangered the maintenance of the union wage scales.[14] The Court considered these factors sufficient to require bargaining on the conditions of subcontracts granted by the carriers to owner-operators.[15] The Board therefore was justified in concluding that the present subcontracts were a legitimate concern of the union, subject to suitable regulation in the collective bargaining agreement.

Petitioners contend, however, that the provisions requiring the subcontractees to become employees of the carriers and thus to become members of the union are utterly unnecessary for the protection of the bargaining unit and therefore have a secondary and not primary objective. They point to the provision in the agreement that work assigned to the bargaining unit can be subcontracted only if all the regular employees are working. This provision, however, is static in nature and does not safeguard the rights of the unit employees in the event of an increase in the volume of work presently performed by owner-operators which the bargaining unit would prefer should fall to it. Similarly, the provision that the carriers will not lease or hire outside equipment unless all their available usable equipment is already at work and barring the use of outside equipment while regular employees are on layoff, does not protect the unit against a carrier's reduction in its equipment either by sale or by failure to replace obsolescent equipment.[16] Moreover, these provisions do not prevent the carrier from failing to replace employees who retire or otherwise leave the

---

[14] 358 U. S. at 291, 293-95.

[15] Id., at 294-95; 362 U. S. at 606.

[16] See Local 24, International Brotherhood of Teamsters v. Oliver, 358 U. S. 283, 294 (1959).

unit. These provisions therefore do not eliminate the appropriateness of additional safeguards in the collective bargaining agreement designed to protect the bargaining unit.

The Board found that the provisions of the agreement requiring that owner-operators and fleet-owners be compensated and treated in general as are union members employed by the carrier constituted the exaction of requirements designed to protect union standards against substandard competition which might be an incentive for an employer to deprive his unionized employees of work. Since the Board decided the present case on a stipulation of facts, the record is neither as complete nor as satisfactory as it might be. As the record is before us, however, we cannot say that the Board erred in concluding that the general union standards provision served a primary rather than a secondary objective, especially in light of the now prevalent view that union standards clauses are valid primary regulations.[17] It should be observed, however, that it is undesirable to determine the conscious objective of a union in obtaining the inclusion of a challenged provision in a collective bargaining agreement on a bare stipulation of facts which supplies no indication of purpose or intention beyond the language of the provision and the general bargaining history.

We come then to the remaining provision, that which requires owner-operators and fleet-owners to become employees and thus to join the union in order to retain the work which they have been doing on subcontract. On their face these requirements are "secondary" in their purpose as well as their result. They do not require a carrier to put an end to subcontracting, but only to terminate it as to its subcontractees who refuse to become

---

[17] See Meat & Highway Drivers, Dockmen, Helpers & Misc. Truck Terminal Employees, Local Union No. 710 v. NLRB, 335 F. 2d 709, 713, 715 and cases cited in n. 16 (D. C. Cir. 1964).

members of the union. Thus, their effect is to make the continuance of the relationship between the employer and an independent contractor depend upon the latter's decision to become a member of the union if he is an owner-operator and to require his employees as well as himself to become members of the union if he is a fleet-owner. The requirement therefore makes the central test of the employer's continuing to do business with such an individual his internal labor policy and not his maintenance of union wage scales or similar conditions which otherwise might adversely affect the unit members. This is substantially similar to provisions which permit an employer to subcontract only with third parties who are unionized. Such provisions have repeatedly been struck down under § 8(e) as implementing illegal secondary objectives. See, e. g., *NLRB v. Joint Council of Teamsters No. 38*, 338 F. 2d 23, 28, 30-31 (9 Cir. 1964); *Meat & Highway Drivers, Dockmen, Helpers & Misc. Truck Terminal Employees, Local Union No. 710 v. NLRB*, 335 F. 2d 709, 717 (D. C. Cir. 1964); *District No. 9, International Association of Machinists v. NLRB*, 315 F. 2d 33, 36-37 (D. C. Cir. 1962).

The present provisions, to the extent that they require the subcontractees to become employees and members of the union, therefore must also be declared invalid. As in the case of secondary boycotts generally, a union may not employ a collective bargaining agreement with one employer as a means of effectuating its object to coerce another employer to unionize. Nor may it by this means seek to coerce self-employed persons to become union members. Congress has made this clear by § 8(b)(4)(A) which prohibits secondary boycotts with an object of "forcing or requiring any employer or self-employed person to join any labor . . . organization. . . ." The self-employed owner-operator is as much entitled to protection from coercion to join a labor organization as is

a fleet-operator who may have one or even many employees.

Nor may these requirements be justified on the assertion that they are the simplest and most effective method of assuring that union standards will be followed in the subcontracting operations. The union presented no evidence before the Board to show that the valid and severable union standards provisions of the collective bargaining agreement were inadequate to safeguard the maintenance of union standards and the Board has pointed to no rationale for its conclusion, but has made only the general observation that a complete prohibition of subcontracting would have had a comparable effect. The parties here, however, carefully refrained from prohibiting subcontracting and the provision requiring that the subcontractees become employees and join the union must therefore be judged as it was written and not as if it were a different case completely prohibiting all subcontracting. The agreement in effect recognizes subcontracting, and since there is nothing to show that the bargaining unit will not be fully protected by the exaction of union standards without affecting the labor practices of the subcontractees, the requirement that they must become employees and members of the union constitutes a reaching out for a "secondary" objective, which is proscribed by § 8(e).

The decision and order of the board dismissing the complaint therefore will be vacated and the case remanded to the Board for further action in accordance with this opinion.

Hastie, *Circuit Judge*, concurring:—I think that the case for vacating the board's dismissal of the petitioners' complaint is stronger than the majority opinion makes it.

Specifically, the majority concede that the challenged provision of the collective bargaining agreement requiring

that subcontractors become employees of the carriers and thus members of the union serves the legitimate function of providing significant added protection to the bargaining unit. In my view, that concession is unwarranted.

Article 30(b) of the City Cartage Agreement and Article 33(b) of the Road Agreement provide that "no work or services presently performed or hereafter assigned to the collective bargaining unit will be subcontracted". The majority read this clause as limited to the "volume" of work now performed by the bargaining unit. I think it is more reasonably read as protecting every type of work performed by the bargaining unit. So read the clause precludes the employer from using either a diminution of the work force, or his refusal to hire needed additional men as work increases, as an excuse for the subcontracting of work. Thus, it seems to me that the only significant objective of the challenged requirement is the application of pressure on third persons, subcontractors, to accede to union demands.

Except in this one particular, I agree with the reasoning of the majority. Of course, I agree that the Board's order be vacated.

APPENDIX B.

United States of America.

Before the National Labor Relations Board.

Highway Truck Drivers and Helpers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Chauffeurs, Teamsters and Helpers, Local 331, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Truck Drivers, Chauffeurs and Helpers, Local 384, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; General Teamsters, Chauffeurs and Helpers, Local 470, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Chauffeurs, Teamsters and Helpers, Local 312, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Truck Drivers and Helpers, Local 676, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

and Case No. 4-CE-7,

Peter D. Walther, an Individual,

Highway Truck Drivers and Helpers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Chauffeurs, Teamsters and Helpers, Local 312, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Chauffeurs, Teamsters and Helpers, Local 331, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Truck Drivers, Chauffeurs, and Helpers, Local 384, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America;

General Teamsters, Chauffeurs, and Helpers, Local 470, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Truck Drivers and Helpers, Local 676, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Delaware County Labor Relations Association; Delaware Valley Labor Relations Association; Schuylkill Valley Labor Relations Association; Private Carriers Association; Local Cartage Operators Association; South Jersey Transport Association, Inc.,

and Case No. 4-CE-8

Joseph T. Wendling, an Individual

Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent

and Case No. 4-CC-267

S & E McCormick, Inc.

Local 470, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent

and Case No. 4-CC-268

S & E McCormick, Inc.

Decision and Order

Upon charges duly filed on June 3, 1963, by Peter D. Walther in Case No. 4-CE-7, and upon charges duly filed on June 4, 1963, by Joseph T. Wendling in Case No. 4-CE-8, the General Counsel of the National Labor Relations Board for Region 4, issued an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing dated October 16, 1963, in Case No. 4-CE-7 and in Case No. 4-CE-8, against Highway Truck Drivers and Helpers, Local 107, International Brotherhood of Teamsters, Chauf-

feurs, Warehousemen and Helpers of America; Chauffeurs, Teamsters and Helpers, Local 312, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Chauffeurs, Teamsters and Helpers, Local 331, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Truck Drivers, Chauffeurs and Helpers, Local 384, International brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; General Teamsters, Chauffeurs, and Helpers, Local 470, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and Truck Drivers and Helpers, Local 676, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called Local 107, Local 312, Local 331, Local 384, Local 470, and Local 676, respectively, and herein also called collectively, Respondent Unions), alleging that Respondent Unions had engaged in and were engaging in unfair labor practices within the meaning of Section 8(e) of the National Labor Relations Act, as amended (herein called the Act), and in Case No. 4-CE-8 that the aforesaid Respondent Unions, together with Delaware County Labor Relations Association, Delaware Valley Labor Relations Association, Schuylkill Valley Labor Relations Association, Private Carriers Association, Local Cartage Operators Association, and South Jersey Transport Association, Inc. (herein called Delaware County, Delaware Valley, Schuylkill Valley, Private Carriers, Local Cartage, and South Jersey, respectively, and herein also called collectively, Respondent Associations), alleging that Respondent Unions and Respondent Associations had engaged in and were engaging in unfair labor practices within the meaning of Section 8(e) of the Act. Copies of the Charges, Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing before a Trial Examiner, were duly served upon the Respondent Unions, Respondent Associations, and the Charging Parties.

On October 28, 1963, Respondent Associations Delaware County, Delaware Valley and Schuylkill Valley duly filed their answer admitting certain allegations of the complaint, but denying the commission of any unfair labor practices. On October 29, 1963, Respondent Associations Private Carriers, Local Cartage, and South Jersey duly filed their answer admitting certain allegations of the complaint, but denying the commission of any unfair labor practices. On October 29, 1963, Respondent Unions filed their answer admitting certain allegations of the complaint, but denying the commission of any unfair labor practices.

Upon charges filed on July 15, 1963, by S & E McCormick, Inc., (herein called McCormick) in Case No. 4-CC-267 and Case No. 4-CC-268, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 4, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing dated October 31, 1963, against Local 107 in Case No. 4-CC-267 and against Local 470 in Case No. 4-CC-268, alleging that Local 107 and Local 470 had engaged in and were engaging in unfair labor practices within the meaning of Section 8 (b)(4)(i) and (ii)(A) of the Act. Copies of the charges, order, consolidated complaint, and notice of hearing before a Trial Examiner were duly served upon the Respondents and the Charging Party. On November 6, 1963, Local 107 and Local 470 duly filed their answer admitting certain allegations of the complaint, but denying the commission of any unfair labor practices.

On November 12, 1963, the General Counsel by the Regional Director for Region 4 issued an order consolidating cases in Cases Nos. 4-CE-7, 4-CE-8, 4-CC-267, and 4-CC-268.[1]

[1] On November 12, 1963, Respondent Union filed a Motion for Bill of Particulars which was denied on November 20, 1963, by Trial Examiner Leo F. Lightner. No appeal from that ruling having been taken, we hereby affirm that ruling.

On November 26 and 27, 1963, a hearing was held before Trial Examiner Reeves R. Hilton. Counsel for the General Counsel, on November 26, was permitted to amend the complaint in Case No. 4-CC-267 and 4-CC-268 to allege an additional violation of Section 8(b)(4)(i) and (ii) (A) of the Act. On November 27, 1963, the hearing was adjourned until December 17, 1963, and on December 17 was continued indefinitely. On June 1, 1964, all parties to this proceeding entered into a Stipulation of Facts. The parties agreed that the charges, consolidated complaints, answers, and Stipulation of Facts constitute the entire record in the case and that no oral testimony was necessary or desired by any of the parties. The parties further stipulated that they waived a hearing before a Trial Examiner and the issuance of a Trial Examiner's Decision and desired to submit this case for findings of fact, conclusions of law, and order directly to the National Labor Relations Board.

On June 5, 1964, the Board granted the parties' request to transfer the case to the Board and to file briefs. Thereafter, the General Counsel, Respondent Unions, and the Charging Parties filed briefs.[2]

Upon the basis of the parties' Stipulation of Facts and upon the entire record in these cases, the Board makes the following:

Findings of Fact

I. *The Business of the Respondent Associations and McCormick, Inc.*

Respondent Associations are, and have been at all times material herein, employer associations admitting to

[2] The request of the Respondent Unions for oral argument before the Board is hereby denied as the record as stipulated and the briefs adequately present the issues and positions of the parties.

membership firms engaged in interstate and intrastate hauling and the transportation of goods and commodities in the Philadelphia, Pennsylvania, and South New Jersey Area, and among other things perform the function of negotiating, executing and administering collective-bargaining agreements on behalf of their employer members with various labor organizations, including the Respondent Unions. In the performance of such functions, Delaware County, Delaware Valley, and Schuylkill Valley have combined together to form the Tri-Area Association. In the operation of their business, employer members of each of the Respondent Associations annually receive in excess of $50,000 from the transportation of goods and materials across State lines.

McCormick is, and has been at all times material herein, a Delaware corporation, engaged in the interstate and intrastate hauling and transportation of goods and maintains offices and terminals in Philadelphia, Pennsylvania, and Wilmington, Delaware. In the operation of its business, McCormick annually receives in excess of $50,000 from services in the transportation of goods and materials across State lines.

On the basis of the foregoing facts, the parties admit, and we find, that Respondent Associations and McCormick are, and have been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. *The Labor Organizations Involved*

Respondent Unions, Locals Nos. 107, 312, 331, 384, 470, and 676, are, and have been at all times material to this case, labor organizations within the meaning of Section 2(5) of the Act.

III. *Background*

The following facts are summarized from the stipulation of the parties:

Cases Nos. 4-CE-7; 4-CE-8

The Respondent Associations are comprised of 84 member carriers who are either private, common or contract carriers as those terms are defined by the Interstate Commerce Act.[3] The member carriers are engaged in the interstate and intrastate transportation of steel, heavy machinery, dry freight, and household goods. In addition to their own employees driving carrier-owned equipment, some of the member carriers utilize the services of owner-operators under contract or lease arrangements in the transportation of the aforementioned goods. The owner-operators or owner-drivers are persons who own either a truck-tractor or a truck-tractor and trailer, lease the truck-tractor (with or without a truck-trailer) to a carrier for the transportation of various commodities by the carriers, and then drive or operate such equipment. On occasion they may provide a substitute driver to operate their equipment in the transportation of the aforementioned commodities for the carrier. Fleet owners own one or more truck-tractors and lease such equipment to one or more carriers with or without drivers. Some of the drivers of fleet equipment, which is leased to carriers with drivers in the absence of the contractual provisions involved herein, are employees of the fleet owner and some are employees of the carrier. The carrier-driver relationship involved in these cases is stated in paragraph 18 of the Stipulation as follows:

> These proceedings involve only those owner-operators or fleet equipment drivers as to whom the Employer-

[3] According to the Stipulation, a single multiemployer unit has been established covering the employees of all local cartage and over-the-road operations of all employers represented by the Employer Associations involved in this proceeding.

employee relationship with the carriers does not apply, but as to whom the contract would establish such Employer-employee relationship.

Neither the owner-operators or owner-drivers nor the fleet owners have permits, licenses, or certificates which authorize them to engage in interstate commerce; therefore, (except for commodities exempted by the Interstate Commerce Commission) they may engage in transportation in interstate commerce only for carriers.

Some of the carriers have had contractual or lease arrangements with owner-operators for varying periods of time, from a minimum of 2 years to a maximum of 27 years.[4] The relationship of some of the owner-operators or owner-drivers to some of the carriers under the contracts or leases is, in fact and in law, that of independent contractors, while others are employees as defined in the National Labor Relations Act, as amended.

Employees of the Respondent Associations' members are represented by Respondent Unions for the purposes

---

[4] They are listed in an Appendix A to the Stipulation with the number of years of their respective lease arrangements as A. E. F. Interstate Transportation Service (10), Carrier Cartage Co. (5), Kulp & Gordon, Inc. (3), Martella Motor Freight (27), Moon Carrier (15), A. Duie Pyle, Inc. (17), Ragens Transportation Company (3), Service Motor Freight, Inc. (4), Wilson Freight Forwarding Co. (2), Robbins Motor Transportation (23), Shanahan Transportation Company (5), Cline's Express (3), Cross Transportation, Inc. (18), Kowalsky Express Service (6), Lobiondo Brothers Motor Express, Inc. (10), Salem Expfess, Inc. (3).

Counsel for the General Counsel, Delaware County, Delaware Valley, Schuylkill Valley and Charging Parties aver that the aforementioned carriers (with the exception of Carrier Cartage Co., Kulp & Gordon, Inc., Ragens Transportation Company, Robbins Motor Transportation and Salem Express) and the owner-operators and leased operators with whom they have lease agreements are in the relationship of independent contractors in fact and in law. Respondent Unions, while agreeing that the relationship of owner-operators and fleet owners to some of the aforementioned Carriers is that of independent contractor, takes the position that as to the independent contractor relationships with specific carriers, it is a matter of proof under applicable law.

of collective bargaining under collective-bargaining agreements negotiated with Respondent Associations and their members. An undetermined number of owner-operators or owner-drivers who have leases or contracts with the Carriers involved herein are not members of any of the Respondent Unions. Respondent Unions acknowledged that the clauses in issue would result in compelling some owner-operators to join their unions. The collective-bargaining agreements between the Respondent Unions and Carriers in existence immediately prior to the agreement in issue herein covered the transportation of steel, heavy machinery, dry freight, and household goods in interstate and intrastate commerce. The contracts involved in the instant case also include the same transportation. Prior to the execution of the contracts involved here, none of the Respondent Associations' members were parties to contracts with any of Respondent Unions containing similar provisions.[5]

Drivers who are qualified to drive the equipment used in the transportation of dry freight and general commodities are also qualified to drive the equipment used in the transportation of steel and heavy machinery and, if physically qualified, are ordinarily qualified to perform driver duties with respect to the latter after instruction as to the handling of the specific commodity. Some drivers of car-

---

[5] It is stipulated that the clauses involved in the instant case are similar to clauses negotiated by affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in various areas of the United States, and that a substantial number of carriers and drivers, including owner-operators covered by those agreements operate into and out of the area covered by the agreements involved herein, and that a substantial number of carriers and drivers, including owner-operators, covered by the agreements involved herein operate into some of the areas covered by other similar agreements.

Wilson Freight Forwarding Co., Kowalski Express Service, and Lobiondo Brothers Motor Express, Inc., are parties to contracts containing similar clauses with other unions in other sections of the United States where they are engaged in the trucking business.

riers may be assigned to the transportation of steel, heavy machinery or dry freight interchangeably. A few of the carriers involved have used and do use owner-operators to perform certain over-the-road driving operations from specified origins to specified areas or destinations. Employees of these carriers have been used to perform such work only when owner-operators were not available or when there was an overflow of such work.

During the early stages of negotiation of the collective-bargaining contracts involved herein, the Respondent Associations opposed the inclusion of the owner-operators clauses and offered to include in the agreements contractual guarantees that no employee driver presently employed would be deprived of employment or work because of the utilization by any carrier of owner-operators.[6]

Cases Nos. 4-CC-267; 4-CC-268

McCormick is engaged in the transportation of heavy construction machinery and iron and steel articles, utilizing the services of both its employees and owner-operators in the performance of such work. Most of the iron and steel articles are transported by owner-operators who are in a contractual or lease relationship with McCormick. For purposes of the Stipulation in this case only, Respondent Unions (Locals 107 and 470) agree that some of the owner-operators in lease or contractual agreements with McCormick are in fact and in law independent contractors. For approximately 7 years, McCormick was a

[6] In addition to the stipulated facts summarized above, Respondent Unions stated that they would present testimony through witnesses as to the circumstances and object of the negotiations of the challenged clauses. The General Counsel, Respondent Associations, and the Charging Parties object to this portion of the Stipulation as irrelevant, immaterial, or conclusionary. In view of our ultimate disposition of the issues herein, we find it unnecessary to rule on these objections or to consider the arguments based thereon. We have, however, included in an Appendix "A" this portion of the Stipulation.

member of Motor Transport Labor Relations, Inc., (herein called MTLR) and was a party to the collective bargaining agreement negotiated on its behalf by MTLR with Respondent Unions which was scheduled to terminate on December 31, 1962, but was extended on December 27, 1962, pending the resolution of the representation proceeding in Case No. 4-RC-5059. Certification issued in that case on May 6, 1963; negotiations were immediately resumed between MTLR and Respondent Unions; and, on June 5, 1963, a new contract was agreed to by the parties. On June 6, McCormick notified MTLR that it was resigning from MTLR as of that date. On June 13, MTLR acknowledged receipt of McCormick's notice and notified Respondent Unions that McCormick had resigned from MTLR and was no longer a party to the master agreement.

On July 1, at a meeting between representatives of Respondent Unions (Locals 107 and 470) and McCormick, the Unions requested McCormick to sign letters of intent to be bound by the area freight agreement covering independent employers which contained the owner-operator clauses alleged to be violative of Section 8(e) of the Act in Case Nos. 4-CE-7 and 4-CE-8. McCormick did not sign the letters but requested time to study them and agreed to notify Respondent Unions within 48 hours of its decision. On July 8, McCormick advised the Unions that it would not sign the letters. On July 15, Respondent Local 107 commenced picketing the premises of McCormick in Wilmington, Delaware, and Respondent Local 470 commenced picketing McCormick's premises in Philadelphia, Pennsylvania. At a meeting on July 31, McCormick agreed to enter into contracts with Respondent Unions subject to an agreement holding in abeyance the owner-operator provisions of the contract. Throughout the events related herein, McCormick objected to the inclusion of the owner-operator clauses in the contracts.

The Stipulation recites that Respondent Unions would present witnesses to testify that the reason for the picketing of McCormick was McCormick's refusal to be bound by the terms of the collective-bargaining agreement, including the payment of wages, which had been negotiated on its behalf by MTLR, and would aver that McCormick's resignation from MTLR was untimely.

IV. *The Alleged Unfair Labor Practices*

Case Nos. 4-CE-7; 4-CE-8

The complaint alleged a violation of Section 8(e) of the Act in that on or about May 21, 1963, Respondent Unions and Respondent Associations, on behalf of their employer members, entered into contracts, including a City Cartage Agreement and an Over-The-Road Agreement, containing among others the following clause:[7]

ARTICLE 1

Scope of Agreement

Section 2. Employees Covered

* * * * * * * *

(c) In all cases hired or leased equipment shall be operated by an employee of the certificated or permitted carrier and such employee shall be paid pursuant to the terms of this Agreement. The Employer expressly reserves the right to control the manner, means and details of, and by which the owner-operator performs his services, as well as the ends to be accomplished.

[7] The complaint also alleged that Article 23 in the City Cartage Agreement and an identical Article number 24 in the Over-the-Road Agreement were violative of Section 8(e) of the Act. The text of those Articles appear in an attached Appendix "B". For convenience, we shall refer to these Articles as Article 23 and to Article 1, Section 2(c), and Article 23, collectively, as the "owner-operator clauses."

The complaint further alleged that, at all times material, Respondent Unions and Respondent Associations maintained and gave effect to the clauses, and that pursuant to these clauses Respondent Associations, on behalf of their members, ceased and refrained and agreed to cease and refrain from handling, using, selling, transporting, or otherwise dealing in the product of other employers, or from doing business with other persons, namely, owner-operators.

Respondent Associations and Respondent Unions admitted in their respective answers that they had entered into contracts containing the clauses, and that they had maintained and given effect to said clauses. Respondent Associations further admitted that pursuant to the clauses they had agreed to cease doing business with other persons. Respondent Unions denied that pursuant to the clauses the Associations had agreed to cease doing business with other persons.

Case Nos. 4-CC-267; 4-CC-268

The complaint alleged that Respondent Local 107 and Respondent Local 470 demanded that McCormick enter into a collective-bargaining agreement containing the clauses and that they picketed and engaged in a strike against McCormick in support thereof, all in violation of Section 8(b)(4)(i) and (ii)(A) of the Act. Respondent Unions admitted that they demanded that McCormick enter into a contract containing the disputed clauses. They further admit the picketing of McCormick's premises, but assert that said picketing was the result of the refusal of McCormick to accept a collective-bargaining agreement which had been negotiated on its behalf by its agent MTLR.

During the hearing, Counsel for the General Counsel amended the consolidated complaint to allege that Re-

spondents Local 107 and Local 470 had further violated Section 8(b)(4)(i)(ii)(A) of the Act by picketing McCormick to obtain the following clause:

ARTICLE 33[8]

Subcontracting

(a) The Employer agrees to refrain from using the services of any person who does not observe the wages, hours and conditions of employment established by labor unions having jurisdiction over the type of services performed.

Pending a determination by the courts that the above Article 33 (a) is valid, the Unions and the Employer shall comply with and enforce only the following modification thereof:

V. *Contentions of the Parties*

On the foregoing stipulated facts, it is the General Counsel's contention in Cases Nos. 4-CE-7 and 4-CE-8 that the owner-operator clauses are unlawful under Section 8 (e) of the Act, and that by entering into agreements containing such clauses and continuing to maintain and give effect to them, Respondent Associations and Respondent Unions have violated and are violating Section 8 (e) of the Act. In Cases Nos. 4-CC-267 and 4-CC-268, the General Counsel contends that Respondent Unions, by striking and picketing McCormick with an object of forcing or requiring McCormick to enter into contracts containing the owner-operator clauses, and, in addition, Article 33 (a)

[8] Only subparagraph (a) Article 33 was alleged by the General Counsel to be violative of Section 8(e). The Unions denied the allegations, but requested that the whole clause be included and the Trial Examiner in granting the General Counsel's motion to amend also granted their request. The full text of Article 33(b) appears in Appendix "B". Article 33 appears in the Over-The-Road Agreement and an identical Article numbered 30 appears in the City Cartage Agreement. For convenience we shall refer to this clause as Article 33(a).

of the *Subcontracting* clause, violated Section 8 (b) (4) (i) and (ii) (A) of the Act.

More specifically, with respect to the owner-operator clauses, Cases Nos. 4-CE-7 and 4-CE-8, the General Counsel contends that the first section of Article 1, Section 2 (c), requiring the carriers to use their own employees to operate all leased equipment, constitutes an agreement by which the carriers agree to cease or refrain from doing business with owner-operators, and that the second sentence effectively prevents the carriers from utilizing the services of owner-operators who will not submit to the common law "right of control" test specified therein, converting them from independent contractors to employees. It is further contended that since Article 23 is an extension of the latter part of Article 1, Section 2 (c), it necessarily restricts the manner in which owner-operators and carriers may deal with each other and effectively prevents them from continuing their present business relationships. Thus, the effect and inevitable consequence of the limitations on the carriers' right to do business with owner-operators will be either to require the carriers to cease doing business with such owner-operators and fleet owners as they have in the past, or change their present business relationship to that of employer-employee, or have their employees become employees of the carriers and members of Respondent Unions.

To rebut the Union's argument that the clauses are valid work preservation clauses, the General Counsel contends that the purpose of the clauses is the regulation and control of the employment conditions of owner-operators with whom the carriers do business, and that they dictate with whom the carriers may do business and the manner in which they may do so. It is argued that since the Union is entitled to represent only employees in an appropriate unit and not independent contractors or their employees, it is only the work of the unit which the union may pro-

tect, and there is no evidence to show that bargaining unit work has been taken from the unit and given to independent contractors. Pointing out that the subject matter of Article 23 as evidenced by Section 16 is wages of owner-operators and not work preservation for the members of the bargaining unit, it is contended that Article 23 cannot be construed to give it a work preservation objective. In fact, the argument runs, carriers are expressly permitted under Section 19 of Article 23 to use owner-operators provided they become employees and their grievances are handled pursuant to the contract. Finally, it is contended that subparagraph (b) of Article 33[9] effectively provides safeguards against subcontracting in order to preserve bargaining unit work and that this express provision argues against any attempt to give a similar construction to the owner-operator clauses at issue here.

Respondent Unions' contentions are as follows: The owner-operator clauses are a prohibition against the subcontracting of work of the type performed by unit employees. There is only a slight degree of difference in the supervision exercised by the carriers over the owner-operators and employees of fleet owners as opposed to unit employees. Both types of drivers perform the same work, have the same skills, use the same equipment, transport the same commodities, work for unit carriers, operate out of the same terminals, engage in local cartage and over-the-road trucking and may own the equipment they drive or may drive leased equipment. The only reason unit employees are not performing the work, say the Unions, is that the carriers have subcontracted it out. Such subcontracting (the argument runs) deprives unit employees of unit work; creates inconsistent standards for drivers performing the same work; creates friction and antagonism between drivers; and, where carriers can

[9] See Appendix "B", *infra*.

compel acceptance of lower standards than those attained by unit employees, cause pressures to reduce further the amount of work available for unit employees. In sum, Respondent Unions contend that the clauses are designed to return unit work to the unit by prohibiting the subcontracting of unit work.

Respondent Unions further contend that Article I, Section 2(c) together with Article 1, Section 2(a),[10] constitute a total prohibition on subcontracting which prevent subcontracting and require the return of previously subcontracted unit work, and that the substance of these clauses is neither augmented nor diminished by Article 23 which is designed to protect the owner-operators from the necessity of using their wages to pay the cost of operating equipment. The necessity for such safeguards, argue the Unions, was clearly recognized by the carriers in their proposal to include in the contract a guaranty that no employee driver presently employed by the carriers would be deprived of work because of the utilization of owner-operators. But Respondent Unions contend such a guar-

---

[10] Article I, Section 2(a) in both the City Cartage Agreement and the Over-the-Road Agreement reads as follows:

Scope of Agreement

* * * * * * * *

Section 2. *Employees Covered*

(a) Employees covered by this Agreement shall be construed to mean, but not limited to, any driver, Chauffeur, or driver-helper operating a truck tractor, motorcycle, passenger or horse-drawn vehicle, or any other vehicle operated on the highway, street or private road for transportation purposes when used to defeat the purposes of this Agreement. The term employee also includes, but is not limited to, all employees used in dock work, checking, stacking, loading, unloading, handling, shipping, receiving, switching and assembling or drag line and allied work. It is understood, however, that the term employee shall be construed to mean those employees of the Employer employed directly and indirectly by and/or under the control of the Employer, and who are represented by the Local Union or during the life of this Agreement may come to be represented by the Local Union.

anty would permit attrition of the unit through discharges, resignations, and retirements. They further contend that since the carriers are permitted to continue to lease equipment, the clauses do not deprive the owner-operators of any work. On the contrary, they are permitted to continue performing such work, but as unit employees, not as independent contractors.

The General Counsel contends, in the McCormick cases, Case Nos. 4-CC-267 and 4-CC-268, that Respondent Locals 107 and 407 in their answers admitted that during the time of their picketing they had demanded that McCormick enter into contracts containing the owner-operator clause alleged in Case Nos. 4-CE-7 and 4-CE-8 to be violative of Section 8(e) of the Act and that their picketing was a result of McCormick's refusal to accept the MTLR agreements. Moreover, during the negotiations that followed, the Unions asked McCormick to sign letters of intent to be bound by the Area Freight Agreement which contained similar clauses.

With respect to subparagraph (a) of Article 33, the General Counsel contends that since it is identical to the clause found to be unlawful by the Board in *Patton Warehouse, Inc.*,[11] Respondent Unions' strike to obtain a contract containing the clause was also violative of Section 8(b)(4)(i) and (ii)(A) of the Act, and the presence of the deferral clause does not make the strike lawful.

VI. *Discussion*

Cases Nos. 4-CE-7; 4-CE-8

Article I, Section 2(c), in effect prohibits the leasing of equipment by the carriers from owner-operators,

[11] *Truck Drivers Union Local No. 413, et al., (The Patton Warehouse, Inc.)*, 140 NLRB 1474, enforced in part, 334 F. 2d 539 (C. A. D. C.), cert. denied 368 U. S. 916.

owner-drivers, or fleet owners unless the drivers of such equipment become and remain employees of the carriers while performing work for the carriers.

It is now well settled that provisions of collective bargaining agreements prohibiting the contracting out of unit work are lawful if they are aimed at the primary and permitted object of protecting and preserving unit work and standards and do not have as their real target the imposition of a boycott on third parties who do not recognize or have a contract with the contracting union.[12]

Thus, in *Calhoun Drywall Company*,[13] the Court of Appeals for the District of Columbia stated:

> We have phrased the test as whether the clauses are "germane to the economic integrity of the principal work unit" and seek "to protect and preserve the work and standards [the union] has bargained for," or instead "extend beyond the [contracting] employer and are aimed really at the union's difference with another employer."[14]

More recently, that Court in considering Section 8(e) has stated:

> Resolution of the difficult issue of primary *versus* secondary activity, . . . involves consideration of two factors: (1) jobs fairly claimable by the bargaining unit, and (2) preservation of those jobs for the bargaining unit. If the jobs are fairly claimable by the unit, they may, without violating either §8(e) or §8(b)(4)(A) or (B), be protected by provision for, an implementation of, no-subcontracting or union standards clauses in the bargaining agreements. Ac-

---

[12] *Retail Clerks Union Local No. 1428 (Jones and Jones, Inc.)*, 155 NLRB No. 74.

[13] *Orange Belt District Council, No. 48, etc. v. N. L. R. B. (Calhoun Drywall Company)*, 328 F. 2d 534 (C. A. D. C.).

[14] *Ibid*, page 538, footnotes omitted.

tivity and agreement which directly protect fairly claimable jobs are primary under the Act.[15]

The parties have agreed in their collective-bargaining agreements that the work included within the scope of the agreement "shall cover all local and road operations of the Employer, . . ." and that "[A]ll operations and work covered herein shall be performed exclusively by employees covered by this Agreement (except as otherwise provided in this Agreement)."[16] Thus, *all* the work performed by the carriers has been bargained for by the Unions, and it is the entirety of that work which constitutes the unit work the Unions have a legitimate primary interest in protecting for the carriers' employees. Here the nature of the work performed by the unit employees of the carriers under the present agreements is identical to the work performed for the carriers by the owner-operators or owner-drivers or employees of fleet owners, i. e., the transportation of steel, heavy machinery, dry freight, and household goods in interstate and intrastate commerce. The parties have stipulated that the collective-bargaining agreements now in effect as well as those immediately prior thereto relate to the performance by unit employees of the same type of work.

In implementation of their legitimate primary interest in "all local and road operations of the Employer," the Respondent Unions have agreed with the Associations in Article I, Section 2(c), that the carriers will use only "employees" to operate hired or leased equipment. To accomplish this objective, and at the same time permit the carriers to continue to utilize hired and leased equip-

---

[15] *Meat and Highway Drivers, Dockmen, Helpers and Miscellaneous Truck Terminal Employees, Local 710, etc. v. N. L. R. B. (Wilson and Co.)*, 335 F. 2d 709, 713, footnotes omitted. Cited *infra* as *Wilson*.

[16] Article I, Section 1, *Scope of Agreement*, Over-the-Road Agreement and City Cartage Agreement.

ment from owner-operators and fleet owners, they have further agreed that the Employers will assert and exercise the "right of control" over the drivers of leased or hired equipment.[17] To do so has the legal effect of converting them to unit employees when performing unit work for the carriers.[18] To further implement and protect the work standards of the bargaining unit work they have agreed in Article 23 to the wages and terms and conditions of employment for drivers who drive their own equipment under lease with a certificated carrier. In the factual context of this case, we are unable to agree with the General Counsel that these provisions, assessed in the light of the applicable principles set out above, have an unlawful secondary objective interdicted by Section 8(e).

The work which the Unions have sought to limit to owner-operators who would agree to become "employees" of the carriers while they were performing it is similar, and even identical, to the work done by the unit employees. The work done by the carriers' employees, and the work for which the carriers retained "independent contractor" truck operators, is done for the same employer in both instances, it is work of the same type or character in both cases, it requires the same skills, it is performed at or its performance is directed or controlled from the same location or base,[19] and any increase in the amount of work

---

[17] In generally comparable circumstances, the Board, with court approval, has found owner-operators and drivers of leased equipment to be employees of the leasee-employer even in the absence of an express "right of control" contractual provision. *Deaton Truck Lines, Inc.*, 143 NLRB 1372, enforced 337 F. 2d 697 (C. A. 5).

[18] See *Reisch Trucking and Transportation Co., Inc.*, 143 NLRB 953, 956 and cases cited therein at footnote 7.

[19] We note that it is stipulated that the "independent contractors" may engage in the interstate transportation of commodities which are nonexempt by the Interstate Commerce Commission *only* for a private, common or contract carrier as those terms are defined in the Interstate Commerce Act and that the Carriers herein are such carriers.

done by owner-operators or other drivers of leased equipment would cause a corresponding decrease in the amount of work available to the unit employees.[20] Any work of this kind done by those outside the unit, i. e., by the "independent contractors," is sufficiently comparable in character, and the terms under which it is done sufficiently affect the terms and conditions of the work done in the unit, to cause the Union to have a direct and necessary interest in the work and to make it unit work within the meaning of *Wilson, supra.*

We particularly note, moreover, that the contractual provisions requiring that owner-operators and other drivers of leased equipment be unit employees subject to the collective-bargaining agreement are applicable and operative only while they are employed to perform work for the signatory carriers of the same kind as is done by other unit employees of such carriers. No attempt is made to regulate their status, or their terms and conditions of employment, when performing work for others, either as independent contractors or drivers of leased equipment.

In these circumstances, we are satisfied that the provisions in question, requiring in effect that all hired or leased equipment be operated by persons occupying toward the certificated carriers the status of employees, was genuinely designed to protect unit work and standards against erosion from subcontracting that might allow the same work to be performed under terms and conditions of employment less favorable than those prescribed in the Union's collective-bargaining agreement. We therefore find that the provisions in issue have a legitimate primary

[20] Article 33(b) of the *Subcontracting* clause (Appendix "B", *infra*) prohibiting an increase in the use of leased equipment with drivers (except as attrition through retirements, quits, or discharges reduces the number of employees in the unit) only slows down, and does not eliminate, inroads on the unit work through increases in subcontracting.

object and are not aimed at achieving secondary objectives tied to union interests outside the unit that Section 8(e) is designed to prevent.

In reaching that conclusion, we have not overlooked the point stressed by the General Counsel that the provisions in question necessitate changes in previously long established business relationships between the carriers and those owner-operators and fleet owners of leased equipment whom the provisions affect. We are unable to agree, however, that this circumstance is sufficient in itself to establish an unlawful secondary objective. Obviously, any agreement prohibiting or restricting the subcontracting of unit work has an impact on business relationships, actual, or potential, and often requires a total cessation of existing business relationships. Yet, we have long held that agreements banning or curbing the subcontracting of unit work are not unlawful for that reason alone. If the clauses are otherwise lawful, the mere fact that, as an incident thereto, a cessation in business relationships may flow from their operation is not alone enough to establish an unlawful secondary object within the intent of Section 8(e). To conclude otherwise would mean that unions would be limited to negotiating clauses prohibiting or restricting subcontracting to those situations where the employer is not engaging in any subcontracting at the time of the making of the contract. Under that view, once work had been subcontracted it could never be considered to be unit work because it would disrupt business relationships to require the employer to cease doing business with its subcontractors. We have been cautioned against such a result by the judicial admonition that the "'cease doing business' language in Section 8(e) cannot be read literally."[21]

---

[21] *Wilson, supra,* at page 713. Also see the language of the Fifth Circuit Court of Appeals in *Houston Insulation Contractors Assn. v. N. L. R. B.,* 357 F. 2d 182, at 188-189.

The requirement that the owner-operators or other drivers of leased equipment performing work for the carriers be employees permits the carriers to enter into equipment leasing agreements with anyone. The only limitation is that those driving the leased equipment for the certificated carriers be "employees" while performing such work so they may be required to observe all the standards and conditions prevailing in the unit.[22] This prevents the impairment of the terms and conditions negotiated by the Union for its members in the unit, and removes the threat of loss of unit work by removing the economic advantage of assigning such work to independent contractors. The Unions' goal, and the thrust of the clause in question, is to assure the performance of unit work by unit employees in accordance with the terms and conditions set out in the Unions' contracts with the employers governing the greater part of the work performed and controlled from their respective locations.[23] In such

---

[22] The maintenance of wage and labor standards in the trucking field has been notoriously difficult. One effort by a union to police its wage standards was before us recently in *Local Union No. 282, IBTCHWA (F. Mascali & Sons, Inc.)*, 155 NLRB No. 102, wherein the union sought (unlawfully, as we found) to prevent mix-plant operators who employed union members from also using independent "gypsy" owner-drivers who had no fixed base of operations. See also *Goldberg v. Maine Asphalt Road Corp.*, 206 F. Supp. 913 (D. Me. 1962), where the employers of owner-drivers attempted (unsuccessfully) to avoid the overtime provisions of the Fair Labor Standards Act by increasing the driver's stated hourly rate after 40 hours of work while simultaneously decreasing the stated hourly rental of the truck by the same amount, so that the total hourly pay for driver and truck remained constant regardless of overtime worked.

[23] In this connection we note that the Union's efforts to protect the standards which they have obtained through collective bargaining has been considered by the Supreme Court, albeit in a different context, to fall within the area of mandatory bargaining, and hence to be a right protected by Section 7 of this Act. In *Local 24, Teamsters Union v. Oliver*, 358 U. S. 283, the Supreme Court in discussing Article XXXII (which except for Section 20 and other minor variations is identical to Article 23 here) reviewed the origin of that Article and the leasing practices of carriers. The

circumstances, the clauses cannot be considered to be invalid subcontracting clauses, such as those which allow subcontracting outside the unit but limit such subcontracting only to such subcontractors as are signatories to a union agreement.

We find no merit in the General Counsel's argument that these clauses are inherently unlawful under Section 8(e) because they have the effect of requiring owner-operators and other drivers of leased equipment while performing services for the certificated carriers to become and remain members of the Respondent Unions in conformity with the union-security clause in the governing collective-bargaining agreements. The legitimacy of the Union's objective in requiring all drivers performing unit work to be unit "employees" subject to the applicable collective-bargaining agreements while performing such work is not converted into an unlawful "cease doing business" one within the intent of Section 8(e) simply because, as an incident to their unit employee status, the drivers are required to comply with all terms and conditions of the

---

Court recognized the legitimate interest of unions in seeking "to protect lawful employee interests against what is believed, rightly or wrongly, to be 'a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards'" and described Article XXXII as "a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract" (358 U. S. at pp. 294-295). Continuing, the Court observed that the rental arrangements at which Article XXXII was directed "not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact a vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service." Subsequently, in *Local 24, Teamsters Union v. Oliver*, 362 U. S. 605 at page 606, the Court observed that the provisions in Article XXXII (Section 4, Article 23 here) which "provide that hired or leased equipment, if not owner driven, shall be operated only by employees of the certificated or permitted carriers . . . are at least as intimately bound up with the subject of wages as the minimum rental provisions" considered earlier in *Local 24, Teamsters Union v. Oliver, supra.*

bargaining contract, including the union-security requirement. Any clause prohibiting subcontracting would have a comparable effect where it results in increasing the amount of unit work available to the bargaining unit, leading to an increase in the number of unit employees becoming subject to a valid union-security clause.

Finally, it is argued that since the contracts contain a separate provision dealing exclusively with subcontracting, the Respondent Unions' position that the clauses are designed to prohibit subcontracting must be rejected. We do not agree. Article 33(b)[24] on which the General Counsel relies to support this argument relates to future subcontracting of work by the Employer and does not deal with the primary dispute which gave rise to the additional prohibitions against subcontracting contained in the clauses alleged to be violative herein. We are satisfied that Article I, Section 2(c), and Article 23, either separately or taken together, do not have a secondary object within the meaning of Section 8(e).

We turn now to the issue of whether subparagraph (a) of Article 33, *Subcontracting*,[25] is unlawful under Section 8 (e), as contended by the General Counsel. That clause is identical to one of the provisions which we found violative of Section 8(e) in *The Patton Warehouse, Inc.*[26] In that case we held the clause to be secondary because in our view it "dictate[d] to the Employer those persons with whom he shall be permitted to do business, rather than obliging him to refrain from contracting out work pre-

---

[24] Appendix "B", *infra*.

[25] See page 11, *supra*.

[26] *Truck Drivers Union Local 413, et al. (The Patton Warehouse, Inc.)*, 140 NLRB 1474, enforced in part, 334 F. 2d 539 (C. A. D. C.). See, also, *Chauffeurs, Teamsters and Helpers "General" Local Union No. 200 (Milwaukee Cheese Company)*, 144 NLRB 826.

viously performed by employees in the bargaining unit."[27] The Court of Appeals for the District of Columbia disagreed, however. It drew a distinction between secondary union-signatory subcontracting clauses which impose boycotts on non-signatories of union agreements and primary union standards clauses "which merely require subcontractors to meet the equivalent of union standards in order to protect the work standards of the employees of the contracting employer."[28] Interpreting the clause "as merely requiring that subcontractors observe the equivalent of union wages, hours, and the like,"[29] the Court found the clause to require only union standards and not union recognition; therefore, not interdicted by Section 8(e).

We have since reconsidered our decision in the light of the Court's reasoning and we now conclude in agreement with the Court that the clause is primary, and thus, not violative of Section 8(e).[30]

---

[27] *Patton, supra,* at page 1486.

[28] *Truck Drivers Union Local 413, et al. v. N. L. R. B., supra,* at 548.

[29] *Ibid.*

[30] Like the Court, however, our conclusion is based on the assumption that "in the absence of any indication to the contrary . . . [the] scope [of the clause] is limited to the contracting out of work which otherwise would be performed by members of the bargaining unit" (334 F. 2d at 548).

In this connection we note as did the Court, that Article 33(a) is included in an article of the contract entitled *"Subcontracting"* and that it is expressly qualified by the subcontracting provision in Article 33(b) which immediately follows and is described as a "modification" of Article 33(a). In these circumstances, we do not deem it appropriate for us to indulge in a presumption of illegality. As the Supreme Court stated in *N. L. R. B. v. News Syndicate Company, Inc., et al.,* 365 U. S. 695, " . . as we said in *Teamsters Local 357 v. Labor Board,* decided this day . . ., *we will not assume* that unions and employers will violate a federal law . . . against a clear command of this Act of Congress. As stated by the Court of Appeals *'In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirma-*

Since we have concluded that the clauses are not in violation of 8(e), Respondent Unions Local 107 and 470 did not violate Section 8(b)(4)(i) and (ii)(A) of the Act in striking and picketing McCormick with an object of obtaining contracts containing these clauses which are alleged to be violative of Section 8(e).

Accordingly, we shall dismiss the consolidated complaints herein.

Conclusions of Law

1. Each of Respondent Unions is a labor organization within the meaning of Section 2(5) of the Act.

2. Each of Employer members of Respondent Associations is an employer within the meaning of Section 2(2) of the Act and each is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. S & E McCormick, Inc. is an employer engaged in commerce within the meaning of Sections 2(6) and (7) and 8(b)(4) of the Act.

---

tively to disclaim all illegal objectives.'" (365 U. S. 695, at pp. 699-700. [Emphasis supplied.]

With due respect for the Circuit Court's views on the matter in *Patton, supra,* Members Fanning and Brown nevertheless believe that Article 33(a) is unlawful as found by the Board in that proceeding. They do not reach that conclusion by presuming unlawfulness but by according the clause what they consider to be its natural meaning in its contractual context. The Employer agrees under Article 33(a) "to refrain from using the services of any person who does not observe the wages, hours and conditions of employment established by labor unions having jurisdiction over the type of services performed." Members Fanning and Brown read this clause as applying to non-unit as well as unit work, even where the non-unit work is of a different character, and as requiring the employees who perform such non-unit work to enjoy the work standards established by any union with trade jurisdiction over the work. Construed thusly, the effective scope of Article 33(a) prescribes union working conditions for another employer's employees in situations unrelated to preserving the work and standards of the bargaining unit here involved.

4. Respondent Unions and Respondent Associations have not engaged in unfair labor practices within the meaning of Section 8(e) of the Act.

5. Respondent Unions Locals 107 and 470 have not engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(A) and Section 2(6) and (7) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, and upon the entire record in these cases, the National Labor Relations Board hereby orders that the consolidated complaints herein be, and they hereby are, dismissed.

Dated, Washington, D. C., June 10, 1966.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member

[Seal]

National Labor Relations Board

APPENDIX "A"

Excerpt From Stipulation

16. Respondent Unions subject to the objections reserved in paragraph 16 (A) below, would present the following testimony through witnesses as to the circumstances and object of the negotiations of the challenged clauses:

(a) The first such Agreement containing provisions relating to owner-operators appeared in the Central States Area Over-the-Road Motor Freight Agreement for the period starting October 1, 1938 to October 31, 1939, and such provisions have appeared continuously in such Agreement with amendments from time to time, down to the present time (*Local 24* v. *Revel Oliver*, 358 U.S. 283, hereinafter cited as *Oliver.)*

(b) The minimum lease contract rates which appear in Section 12 of Article 24 of Exhibit 1(b) resulted from surveys made by Unions and Carriers with regard to the cost of operation of leased equipment under other contracts in other areas and referred to in *Oliver*. Such rates have been increased from time to time to keep up with what the unions claim was the increased cost of operations and those rates were not intended to give to the owner-driver a profit for the use of his equipment. However, owner-drivers are free to negotiate lease rental rates which are in excess of the minimums established by the Agreement, and it is common for them to do so. *(Oliver)*

(c) Such minimum lease rental rates apply only to the equipment which an owner-driver leases to a Carrier and which the owner-driver drives himself in the transportation of commodities for such Carrier. *(Oliver)*

(d) Article 1, Section 2 and Article 23 of the collective bargaining agreement (Exhibit 1 a) before the Board

in this case are essentially the same contract clauses which were before the United States Supreme Court in the case of *Local 24* v. *Revel Oliver*, 358 U.S. 283, and the statements contained in the record and in the opinion of the Court in that case accurately set forth the reasons, intent, purposes and motive for the negotiation of such contract clauses by the Respondent Unions. *(Oliver)*

(e) The Union negotiated the Article to prevent undermining of the negotiated drivers' wage scale resulting from the practice of Carriers of leasing a vehicle from an owner-driver at a rental which returned to the owner-driver less than his actual costs of operation, so that the driver's wage received by him, although nominally the negotiated wage, was actually a wage reduced by the excess of his operating expenses over the rental he received. *(Oliver)*

(f) The Carriers and the Union have disputed since 1938 the terms of a Carrier's hire of a lessor's driving services with his leased vehicle. *(Oliver)*

(g) The usual lease is by the owner of a single vehicle who hires out his services as driver with his vehicle *(Oliver)*

(h) The nub of the Union's position since 1938 has been that the Carriers abuse the leasing practice, particularly by paying inadequate rentals for the use of leased vehicles, with the result that part of the men's wages for driving was being used for the upkeep of their vehicles. . . . The Union's demands for contract provisions relating to owner-operators were designed also to secure a living wage for the lessor plus an adequate rental for this equipment. *(Oliver)*

(i) A minimum rental clause first appeared in the 1938 agreement which also contained provisions comparable

to Section 8, 10 and 14 of present Article 23, (Exhibit 1 a). In 1939, after the Union claimed that "there were a lot of people that were transferring their title into other people's name to avoid the conditions of the contract," Section 3 was added to provide that "certificate and title to the equipment must be in the name of the actual owner." When the dispute brought the parties to the verge of a strike in 1941, the note to Section 1 and Sections 13, 15, 16, 17 and 18 came into the agreement. *(Oliver)*

(j) In 1946 the Union demanded agreement from the Carriers to abolish the leasing practice claiming the Carriers were taking advantage of certain provisions of the contract. This demand was compromised by the addition of Section 19 restricting leasing to Carriers who will agree to submit all grievances pertaining to owner-operators to joint Employer-Union grievance committees in each respective state; the section represented the compromise between the union position that it should abolish all owner-operators and the Carriers' contention that there should be no limitation. *(Oliver)* Section numbers referred to in subparagraphs (i) and (j) are the same section numbers which appear in Articles 23 and 24 in Exhibits 1(a) and 1(b) respectively.

(k) The Union also urged in support of its contract demands relating to Owner-operators that the inadequacy of a rental which means that the owner-operators makes up his excess costs from his driver's wages would result in the progressive curtailment of jobs through withdrawal of more and more Carrier-owned vehicles from service. *(Oliver)*

(l) The purpose and intent of the contract clauses in question is to preserve work covered by the contracts in evidence as Exhibits 1(a) and 1(b), to employees within the collective bargaining unit. (Article 1, Section 2; Ar-

ticle 23, Sections 1 and 4 of the Exhibit 1(a); *Local 24* v. *Revel Oliver*, 358 U.S. 283 at 298).

(m) Drivers of fleet-owned equipment are also required to become employees of the Carrier under the provision of the Agreements. However, the lease rental rate which the Carriers pay to the fleet-owner for the use of his equipment is subject to negotiation between the fleet-owner and the Carrier, and is not in any way regulated by the contract. *(Oliver)*

(n) The reason and object for requiring that all drivers of leased equipment including drivers of fleet-leased equipment become employees of the Carrier is the same as that relating to owner-operators, that is, to assure the payment of negotiated drivers' wages and to assure that work covered by the collective bargaining agreement be performed only by employees covered by the collective bargaining agreement. *(Oliver)*

APPENDIX "B"

ADDITIONAL CLAUSES ALLEGED TO BE VIOLATIVE OF SECTION 8(E)[1]

Cases Nos. 4-CE-7-8 and 4-CC-267-268

* * * * * * *

ARTICLE 23 (City Cartage Agreement)

* * * * * * *

ARTICLE 24 (Over-The-Road Agreement)

Owner Operators

Effective July 1, 1963

SECTION 1. Owner-Operators (see note), other than certificated or permitted carriers, shall not be covered by this Agreement unless affiliated by lease with a certificated or permitted carrier which is required to operate in full compliance with all the provisions of this Agreement and holding proper ICC and state certificates and permits. Such Owner-Operators shall operate exclusively in such service and for no other interests.

(Note): Whenever "Owner-Operator" is used in this article, it means Owner-driver only, and nothing in this article shall apply to any equipment leased except where Owner is also employed as a driver.)

SECTION 2. This type of operator's compensation for wages and working conditions shall be in full accordance with all the provisions of this Agreement. The Owner-Operator shall have seniority as a driver only, provided, however, that owner-drivers shall not bump onto company equipment except where a vacancy occurs or the company.

[1] Consolidated Complaints, General Counsel's Exhibits Nos. 1(i) and 1(n).

adds additional equipment in which event he may bump onto such equipment, provided further that if he does so bump he shall go to the bottom of the seniority roster for work preference but shall have seniority from original date of hire for purposes of layoff and all other contract benefits. In the event of layoff he shall exercise his seniority from his original date of hire. After bumping as provided above, he shall accumulate seniority for all work preferences from the date of bumping onto company equipment.

SECTION 3. Certificate and title to the equipment must be in the name of the actual owner.

SECTION 4. In all cases, hired or leased equipment shall be operated by an employee of the certificated or permitted carrier. The Employer expressly reserves the right to control the manner, means and details of, and by which, the Owner-Operator performs his services, as well as the ends to be accomplished.

SECTION 5. Certificated or permitted carriers shall use their own available equipment, together with all leased equipment under minimum thirty-day (30) bona fide lease arrangements, on a rotating board, before hiring any extra equipment.

SECTION 6. Separate checks shall be issued by the certificated or permitted carriers for driver's wages and equipment rental. At no time shall the equipment check be for less than actual miles operated. Separated checks for drivers shall not be deducted from the minimum truck rental revenue. The driver shall turn in time directed to the certificated or permitted carrier. All monies due the Owner-Operator may be held no longer than two (2) weeks, except where the Lease of Equipment Agreement is terminated and in such case all monies due the operator may be held no longer than thirty (30) days from the date of the termination of the operation of the equipment.

SECTION 7. Payment for equipment service shall be handled by the issuance of a check for the full mileage operated, tonnage or percentage, less any agreed advances. A statement of any charges by the certificated or permitted carrier shall be issued at the same time, but shall not be deducted in advance.

SECTION 8. The Owner-Operator shall have complete freedom to purchasing gasoline, oil, grease, tires, tubes, etc., including repair work, at any place where efficient service and satisfactory products can be obtained at the most favorable prices.

SECTION 9. There shall be no deduction pertaining to equipment operation for any reason whatsoever.

SECTION 10. The Employer or certificated or permitted carrier hereby agrees to pay road or mile tax, social security tax, compensation insurance, public liability and property damage insurance, bridge tolls, fees for certificates, permits and travel orders, fines and penalties for inadequate certificates, license fees, weight tax and wheel tax, and for loss of driving time due to waiting at state lines, and also cargo insurance. It is expressly understood that the owner-driver shall pay the license fees in the state in which title is registered.

All tolls no matter how computed must be paid by the Employer regardless of any agreement to the contrary.

All taxes or additional charges imposed by law relating to actual truck operation and use of highways, no matter how computed or named, shall be paid by the carrier, excepting only vehicle licensing as such, in the state where title is registered.

SECTION 11. There shall be no interest or handling charge on earned money advanced prior to the regular pay day.

SECTION 12 (A) All certificated or permitted carriers hiring or leasing equipment owned and driven by the owner-driver shall file a true copy of the Lease Agreement covering the owner-driver equipment with the Joint Area Committee. The terms of the lease shall cover only the equipment owned and driven by the owner-driver and shall be in complete accord with the minimum rates and conditions provided herein, plus the full wage rate and supplementary allowances for drivers as embodied elsewhere in this Agreement.

(B) The minimum rate for leased equipment owned and driven by the owner-driver shall be:

Single Axle,
Tractor only ..... 10½¢ per mile
Tandem Axle,
Tractor only ..... 11¢ per mile
Single Axle,
Trailer and 35 to 40 foot tandem trailer only ..... 4¢ per mile
(with $8.00 minimum daily guarantee.)
Tandem Axle,
40 foot or over, Trailer only. 5¢ per mile
(with $10.00 minimum daily guarantee.)

Minimum daily guarantee for trailers does not apply to Saturday, Sunday or holidays, it applied to either the first day or last day of use, but not both.

The above rates also apply to deadheading.

The above rates are based on twenty-three thousand pounds (23,000) load limit for single axle tractors and twenty-seven thousand pounds (27,000) load limit for tandem axle tractors.

On load limits over twenty-three thousand pounds (23,000) there shall be ½¢ additional per mile for each one thousand pounds (1,000) or fraction thereof in excess of twenty-three thousand pounds (23,000).

There shall be a minimum guarantee of twenty-five thousand pounds (25,000) for leased single axle tractors and twenty-seven thousand pounds (27,000) for leased tandem axle tractors owned and driven by the owner-driver.

During the first year of a lease, there shall be a minimum guarantee of $100 a month for rental of single axle tractors unless the lease is terminated by mutual agreement or for just cause (which does not include lay-off). There shall be an offset against such minimum monthly guarantee to the extent that rental income exceeds the minimum mileage rental revenue provided herein, and to the extent of other for hire rental revenue during periods of lay-off.

The carrier may, at its option, provide a minimum guarantee of 26,000 pounds for single axle tractors in lieu of the minimum monthly guarantee provided herein.

Nothing herein shall apply to leased equipment not owned by the driver.

The minimum rates set forth above result from the joint determination of the parties that such rates represent only the actual cost of operating such equipment. The parties have not attempted to negotiate a profit for the owner-driver.

SECTION 13. Driver-owner mileage scale does not include use of equipment for pickup or delivery at point of origin terminal or at point of destination terminal, but shall be subject to negotiations between the local union and company. Such negotiations shall be only for the purpose of protecting the wage rate of the driver only as an employee. Failure to agree shall be submitted to the grievance procedure.

SECTION 14. There shall be no reductions where the present basis of payment is higher than the minimums established herein for this type of operation. Where Owner-

Operator is paid on a percentage or tonnage basis and the operating company reduces its tariff, the percentage or tonnage basis of payment shall be automatically adjusted so that the Owner-Operator suffers no reduction in equipment rental or wages, or both.

SECTION 15. It is further understood and agreed that any arrangements which have heretofore been entered into between members of this Union, either among themselves or with the Employer or with the aid of the Employer, applicable to owner-driver equipment contrary to the terms hereof, shall be dissolved or modified within thirty (30) days after the signing of this Agreement so that such arrangements shall apply only to equipment of the owner-driver while being driven by such owner-driver. In the event that the parties cannot agree on a method of dissolution or modification of such arrangement to make the same conform to this Agreement, the question of dissolution or modification shall be submitted to arbitration, each party to select one member of the Arbitration Board, and the two so selected to choose a third member of said Board. If the two cannot agree upon the third within five (5) days, he shall be appointed by the Joint Area Committee. The decision of said Board is to be final and binding.

SECTION 16. It is further agreed that the intent of this clause and this entire Agreement is to assure the payment of the Union scale of wages as provided in this Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wage scales provided in this Agreement. This clause is intended to prevent the continuation of or formation of combinations or corporations or so-called lease of fleet arrangements whereby the driver is required to and does periodically pay losses sustained by the corporation or fleet arrangement, or is required to accept less than the actual cost of the running of his equipment, thus, in fact, reducing his scale of pay.

SECTION 17. It is further agreed that if the Employer or certificated or permitted carrier requires that the "driver-owner-operator" sell his equipment to the Employer or certificated or permitted carrier, directly or indirectly, the "driver-owner-operator" shall be paid the fair true value of such equipment. Copies of the instruments of sale shall be filed with the Union and unless objected to within ten (10) days shall be deemed satisfactory. If any question is raised by the Union as to such value, the same shall be submitted to arbitration, as above set forth, for determination. The decision of the Arbitration Board shall be final and binding.

SECTION 18. It is further agreed that the Employer or certificated or permitted carrier will not devise or put into operation any scheme, whether herein enumerated or not, to defeat the terms of the Agreement, wherein the provisions as to compensation for services on and for use of equipment owned by owner-driver shall be lessened, nor shall any owner-driver lease be cancelled for the purpose of depriving Union employees of employment, and any such complaint that should arise pertaining to such cancellation of lease or violation under this section shall be subject to Article 7.

SECTION 19. (A) The use of individual Owner-Operators shall be permitted by all certificated or permitted carriers who will agree to submit all grievances pertaining to Owner-Operators to the Joint Area Committee. It is understood and agreed that all such grievances will be promptly heard and decided within the specific purpose in mind of:

(1) Protecting provisions of the Union contract;

(2) Prohibiting any and all violations directly or indirectly of contract provisions relating to the proper use of individual owners;

(3) Prohibiting any attempts by any certificated or permitted carrier in changing his operation which will affect the rights of drivers under the terms of the contract, and generally the certificated or permitted carriers agree to assume responsibility in policing and doing everything within their power to eliminate all alleged abuses in the use of owner-drivers which resulted in the insertion of Section 19 (Article 33) in the original 1945-47 central states over-the-road contract;

(4) Owner-driver operations to be terminal to terminal, except where no local employees to make such deliveries or otherwise agreed to in this contract;

(5) The certificated or permitted carriers agree that they will, with a joint meeting of the Unions, set up uniform rules and practices under which all such cases will be heard;

(6) It shall be considered a violation of the contract should any operator deduct from rental of equipment the increases provided for by the 1963 amendments or put into effect any means of evasion to circumvent actual payment of increases agreed upon effective for the period starting January 1, 1963 and ending August 31, 1964.

(B) No Owner-Operator shall be permitted to drive or hold seniority where he owns three or more pieces of leased equipment. This provision shall not apply to present Owner-Operators having three or more pieces of equipment under lease agreement, but such Owner-Operator shall not be permitted to put additional equipment in service so long as he engages in work covered by this Agreement or holds seniority. Where such Owner-Operator drives, he can hold seniority where he works sixty (60) percent or more of time.

SECTION 20. All leases, agreements, or arrangements between carriers and Owner-Operators shall contain the following statements:

> The equipment which is the subject of this lease shall be driven by an employee of the lessee at all times that it is in the service of the lessee.
>
> If the lessor is hired as an employee to drive such equipment he shall receive as rental compensation for the use of such equipment no less than the minimum rental rates, allowances, and conditions (or the equivalent thereof as approved by the Joint Area Committee), established by this Agreement for this type of equipment, and in addition thereto, the full wage rate and supplementary allowances for drivers (or the equivalent thereof as approved by the Joint Area Committee).
>
> To the extent that any provision of this lease may conflict with the provisions of this Agreement as it applies to equipment driven by the owner such provision of this leave shall be null and void and the provisions of such agreement shall prevail.

ARTICLE 33 (Over-The-Road Agreement)

* * * * * * * *

ARTICLE 30 (City Cartage Agreement)

Subcontracting

* * * * * * * *

(b) For the purpose of preserving work and job opportunities for the employees covered by this Agreement, the Employer agrees that no work or services presently performed or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, assigned or conveyed in whole or in part to any other plant,

person or non-unit employees, unless otherwise provided in this Agreement. The Employer may subcontract work when all of his regular employees are working, except that in no event shall road work presently performed or runs established during the life of this Agreement be farmed out. No dock work shall be farmed out except for existing situations established by agreed-to-past practices.

Occasional overflow loads may be delivered by drivers other than the Employer's employees provided that this shall not be used as a subterfuge to violate the provisions of this Agreement. Loads may also be delivered by other agreed-to methods or as presently agreed to.

The normal, orderly interlining of freight for peddle on an occasional basis, where there are parallel rights, and when not for the purpose of evading this Agreement shall be permitted. Alleged violations of this provision shall be submitted to the grievance procedure.

APPENDIX C.

Section 8(e) of the National Labor Relations Act, as amended, (29 USC 158 (e)), provides:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

SUPREME COURT, U. S.

FILED

DEC 26 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

NO. 888 OCTOBER TERM, 1967

LOCALS 107, 312, 331, 384, 470, and 676, Affiliated With the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Petitioners,

v.

A. DUIE PYLE, INCORPORATED, A. E. F. TRANSPORTATION, INCORPORATED, AND NATIONAL LABOR RELATIONS BOARD, Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT H. KLEEB
Counsel for Respondent
2107 The Fidelity Building
123 S. Broad Street
Philadelphia, Pa. 19109

Of Counsel:
MORGAN, LEWIS & BOCKIUS

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	2
A. Proceedings before the National Labor Relations Board	4
B. Proceedings in the Court Below	4
REASONS FOR DENYING CERTIORARI	5
CONCLUSION	10
APPENDIX	1a
A. Entire Stipulated Record before the National Labor Relations Board	1a

Cases Cited

District 9, International Brotherhood of Machinists *v.* NLRB, (D.C. Cir. 1964) 315 F. 2d 33	9
Fibreboard Paper Products Corp. *v.* NLRB 379 U.S. 203	6
Local 24, International Brotherhood of Teamsters, 358 U.S. 283 and 362 U.S. 605	5
Meat and Highway Drivers, Local 710 *v.* NLRB (Wilson and Co.) (D.C. Cir. 1964), 335 F. 2d 709	7, 9
National Woodwork Mfgrs. Assn. *v.* NLRB, 386 U.S. 612	6, 8, 9
NLRB *v.* Joint Council of Teamsters No. 38 (9th Cir. 1964), 338 F. 2d 23	9
Truck Drivers Union, Local 413 *v.* NLRB (Patton Warehouse) (D.C. Cir. 1964), 334 F. 2d 539	9

Statutes Cited

29 U.S. C. 158 (e)	2

IN THE

Supreme Court of the United States

No. 888 OCTOBER TERM, 1967

LOCALS 107, 312, 331, 384, 470, and 676, Affiliated With the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Petitioners,

v.

A. DUIE PYLE, INCORPORATED, A. E. F. TRANSPORTATION, INCORPORATED, AND NATIONAL LABOR RELATIONS BOARD, Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

OPINIONS BELOW

The Opinion and Judgment of the Court Below are printed in Appendix "A", pages 1a-11a of the Petition for Writ of Certiorari. The Decision and Order of the National Labor Relations Board (159 NLRB No. 1) are unreported and are printed in Appendix "B", pages 12a-54a of the Petition for Writ of Certiorari. The Petition for Certiorari does not include the entire stipulated record below but only an excerpt therefrom, entered into under Respondents' objection. Respondents include herein, as Appendix "A", of the Brief for Respondent in Opposition, the entire stipulated record.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari.

QUESTION PRESENTED

Whether Section 8(e) of the National Labor Relations Act proscribes an agreement between a labor union and common carriers by which those carriers must cease and refrain from doing business with independent contractors who own and/or operate their own vehicles (and which agreement requires that these independent contractors become Union members) despite the existence of other provisions in that agreement guaranteeing the economic and physical integrity of the collective bargaining unit and preserving the work of the employees in the unit.

STATUTE INVOLVED

The statutory provision involved is Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. 158(e), and is printed in Appendix "C", page 55a of the Petition for Writ of Certiorari.

STATEMENT

In 1963, Local Teamster Unions Nos. 107, 312, 331, 384, 470 and 676 (hereinafter called the Union), all in the Philadelphia area, entered into a single collective bargaining agreement covering the multi-employer unit established under past agreements and comprised of the employees of 84 carriers engaged in local cartage and over-the-road trucking. The Respondents are carriers in that bargaining unit.

Some of the carriers within the multi-employer unit use their own equipment and employees exclusively; others use a mixture of their own and leased equipment; others rely heavily on leased equipment. The motor truck

carrier industry in the Delaware, New Jersey and Pennsylvania area always has contained a mixture of certificated carriers and owners of equipment available to lease. This leasing practice has existed for over 30 years. The practice has been one of the industry's classic methods of observing operational flexibility and business growth while at the same time exercising the greatest economy over capital investment in equipment and physical facilities.

Ownership of trucks, trailers and maintenance facilities is diffused among hundreds of persons. Some lessors are called "owner-operators" because they own and operate a single tractor-trailer which they may lease by the month or longer to a certificated carrier. Other lessors are called "fleet-operators" because they own more than one tractor-trailer which they lease to certificated carriers. The owner-operator occasionally may place a substitute driver on his equipment. The fleet-operator may drive one of his own vehicles and he employs other persons to drive his other vehicles. By stipulation of the parties, the only owner-operators or fleet-owners with which we are concerned in this proceeding are independent contractors; *i.e.* those owner-operators and fleet-owners as to whom the employer-employee relationship with the carrier does not apply, but as to whom the disputed provisions of the 1963 collective bargaining agreement would require such employer-employee relationship (Stipulation 18, Appendix "A", of the Brief for Respondent in Opposition, page 12a).

In the 1963 contract negotiations, the Union insisted upon the contested "owner-operator" language. The Union threatened a strike if the disputed language was not accepted. The carriers in the multi-employer bargaining unit capitulated *under protest,* maintaining that the disputed language was illegal. The parties agreed that the disputed provisions, although contained in the Agreement, would not be enforced until their legality was established.

A. Proceedings before the National Labor Relations Board

Upon execution of the Collective Bargaining Agreement containing the disputed provision, charges were filed June 3, 1963, on behalf of Respondents. On September 19, 1963, the Regional Director for the Fourth Region of the National Labor Relations Board, petitioned the United States District Court for the Eastern District of Pennsylvania for an Injunction under Section 10(1) of the National Labor Relations Act, alleging his reasonable cause to believe that the disputed language violated Section 8(e) of the Act as charged. An Order Granting Temporary Injunction was issued on December 9, 1963. Thereafter, the General Counsel issued his complaint and joined in an all-party stipulation of facts. A Trial Examiner's hearing was waived and all of the litigants' pleadings and briefs to the full National Labor Relations Board were on file by July 23, 1964. However, the Board did not issue its Decision and Order dismissing the complaint until June 10, 1966.

B. Proceedings in the Court Below

Upon Petition for Review, the Court of Appeals for the Third Circuit found that the disputed provision of the Agreement violated Section 8(e) of the National Labor Relations Act. The Board's approval of the provision requiring independent contractors to become bargaining unit employees was the only finding which Respondents challenged in the Third Circuit.

The Decision and Order of the Board dismissing the complaint was vacated and the case remanded to the Board for further action in accordance with the opinion of the Third Circuit.

REASONS FOR DENYING CERTIORARI

The main thrust of Petitioner's argument for granting certiorari is that the decision of the Third Circuit is in conflict with this Court's decisions in *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283 and 362 U.S. 605. It is submitted that the court's decision below correctly interpreted *Oliver* and in no way conflicts with *Oliver*.

Article XXXII in *Oliver* is the provision which the Petitioner alleges allows a cessation of business and forces an owner-operator or fleet-owner to join the Teamsters. In *Oliver* this Court stated that no claim was made by any party that the Article in question violated any provision of federal law. Furthermore, Article XXXII applied to an individual owner-operated only when he was driving his own vehicle for a carrier (358 U.S. 286). The provision in issue applies not only to an owner-operator driving his own vehicle but also to a fleet-owner (who owns several vehicles, employs a number of drivers and leases his equipment and drivers, including himself, to the carrier). The only connection *Oliver* had to work preservation was the adverse effect on the negotiated wage scale of bargaining unit employees if the *rental* of the owner-operator's leased vehicle was not regulated. The object of Article XXXII was to protect the wage scale of the carrier's employees against possible undermining, through diminution of the owner-operator's compensation for driving, which might result from a *rental* arrangement which did not cover his operating costs. This Court decided that the thrust of Article XXXII was wages and not price fixing and, therefore within the ambit of mandatory collective bargaining (to preserve the economic integrity of the collective bargaining unit); and such mandatory collective bargaining could not be abridged by the State of Ohio's anti-trust statute. That this is all that was decided

in *Oliver* is confirmed by *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 212:

> "Conditions imposed upon contracting out work to prevent possible curtailment of businesses and the undermining of conditions of employment for members of the bargaining unit constituted a statutory subject of collective bargaining." [Citing *Oliver*].

The Petition for Writ of Certiorari states that *Fibreboard* is a continuation of *Oliver* (Petition for Certiorari, page 8). This is correct only to the extent that *Fibreboard* held that the question of whether an employer can replace his present employees in the bargaining unit with those of an independent contractor is a subject of mandatory collective bargaining. *Fibreboard* was never intended to reach a situation which the Petition for Writ of Certiorari claims it does. See also *National Woodwork Mfgrs. Assn. v. NLRB*, 386 U.S. 612, 642.

In the present case, both the economic and physical integrity of the bargaining unit are protected for the present and the future by specific contract provisions. The Master Agreement of 1963 contains a provision (Article 30(b) in the City Cartage Agreement and Article 33(b) in the Road Agreement) (Petition for Certiorari, 53a, 54a), with which Respondents take no issue:

> "For the purpose of preserving work and job opportunities for the employees covered by this Agreement, the Employer agrees that *no work or services presently performed or hereafter assigned to the collective bargaining unit* will be subcontracted, transferred, leased, assigned or conveyed in all or in part to any other plant, person, or non-unit employees, unless otherwise provided by this Agreement." (Emphasis added).

The Master Agreement also contains elaborate language and procedures concerning economic conditions and negotiated rental and wage rates for owner-operators and fleet-owners, none of which are questioned or disputed by Respondents. Despite this, Petitioner fears that unless certiorari is granted it "may well lead to grave industrial strife in the transportation industry . . ." (Petition for Certiorari, page 10). These fears are unfounded. It is *not* the number of members in the bargaining unit who are protected but the *work* which they perform. No matter how many employees are lost from the bargaining unit because of attrition, etc., the protective language will continue to apply to *work* and not to employees. Therefore, carrier employers will have to make new hires in order to conform to the measured amount of work which is performed by and guaranteed to the unit. Furthermore, the fact that Respondents raised no objections to negotiating wage rates and other conditions for owner-operators and fleet-owners makes it impossible for the bargaining unit employees to be endangered by the presence of independent contractors performing work and services which they have performed for these carriers for over 30 years. Unless it can be shown clearly that the presence of the independent contractor in some way harms the collective bargaining unit, he also has the right to be protected from involuntary loss of his entrepreneurial status.

The Petitioner states that *Meat and Highway Drivers, Local 710 v. NLRB (Wilson & Co.)* (D.C. Cir. 1964) 335 F.2d 709, 713, gives it the right to employ the tactics and seek the objectives which it did in this situation to acquire "fairly claimable work." The facts in *Wilson,* which lead to the dictum of "fairly claimable work" are distinguishable from the facts in the present case. Here the Petitioner is unable to show that its goal in forcing independent contractors to become employees

and Union members is primary, necessary for protection of the collective bargaining unit and the preservation of work which the employees in the unit perform. The Petitioner is unable to produce any evidence to show that the presence of independent contractors has in any way resulted in economic or physical decline in either bargaining unit work, strength or wage standards. Furthermore, as the Third Circuit noted, the Petitioner has *never* presented any evidence "to show that the valid and severable union standards provisions of the collective bargaining agreement were inadequate to safeguard the maintenance of union standards . . ." (Petition for Certiorari, page 10a).

This Court in *National Woodwork Mfgrs. Assn., supra* at 645 said:

> "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees."

All of the standards which the Union needs to guarantee protection for the bargaining unit are present. There is an elaborate scheme of wages and rental arrangements for the owner-operator and fleet owner, which the Petitioner insisted upon and which the Respondents do not dispute. There is no economic advantage for carriers using independent contractors rather than their own employees. The limitations on subcontracting are so severe that "no work or services presently performed or hereafter assigned" to the bargaining unit can be performed by independent contractors. Loss of work by utilization of independent contractors is not foreseeable. On the contrary, Petitioner's bargaining unit representation has flourished and grown in spite of this utilization.

The provision the Respondents attacked in the court below does not relate to independent contractors observing Union standards, but to carriers doing business with independent contractors. The provision in issue does not

require a carrier to cease subcontracting, but to cease subcontracting to independent contractors who refuse to become carrier employees and members of the Union (Petition for Writ of Certiorari, pages 8a, 9a). (Petition for Certiorari, Appendix "B", 45a-53a).

The provision *in issue* is purely and simply a Union signatory clause and is banned under the Section 8(e) prohibition as stated in *Truck Drivers Union Local 413* v. *NLRB (Patton Warehouse)*, 334 F.2d 529 (D.C. Cir. 1964). The carriers can subcontract only with third parties who are unionized. Such a provision has repeatedly been struck down under Section 8(e) as having a secondary objective. *NLRB* v. *Joint Council of Teamsters No. 38*, 338 F.2d 23, 28, 30-31 (9th Cir. 1964); *Meat and Highway Drivers, Local 710, supra*, at 717; *District No. 9, International Brotherhood of Machinists* v. *NLRB*, 315 F.2d 33, 36-37 (D.C. Cir. 1967).

The Third Circuit's decision stated that the requirement that independent contractors must become carrier employees and members of the union constituted a reaching out for a "secondary objective" which is proscribed by Section 8(e) (Petition for Certiorari, page 10a). There never has been any consideration of state laws on union security in the history of this case. Only federal law has been considered and litigated. It is misleading for Petitioner to state that the Third Circuit's decision makes "the legality of the clauses under Section 8(e) turn upon the various state laws on Union security, . . ." (Petition for Certiorari, page 12). It is misleading for Petitioner to assert that these clauses have been successfully incorporated through collective bargaining. The disputed clauses were agreed to only under protest, in order to avert a strike. It was agreed by stipulation that their legality would be challenged and that they would not be effectuated until the rendering of a final judgment decree.

The decision of the Third Circuit reflects the body of federal labor law on the interpretation of Section 8(e); honors Congressional intent; conforms to national labor policies and statutory laws; recognizes the fact that the Petitioner's bargaining unit faces no threat of loss of work or danger to its economic or physical integrity; and is directly on point with *Oliver, Fibreboard,* and *National Woodwork.*

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT H. KLEEB,
Counsel for Respondents

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH SESSION

HIGHWAY TRUCK DRIVERS AND HELPERS, LOCAL 107, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 331, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; TRUCK DRIVERS, CHAUFFEURS AND HELPERS, LOCAL 384, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; GENERAL TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL 470, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; CHAUFFEURS TEAMSTERS AND HELPERS, LOCAL 312, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; TRUCK DRIVERS AND HELPERS, LOCAL 676, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and Case No. 4-CE-7

PETER D. WALTHER, An Individual

HIGHWAY TRUCK DRIVERS AND HELPERS, LOCAL 107, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 312, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 331, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; TRUCK DRIVERS, CHAUFFEURS, AND HELPERS, LOCAL 384, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; GENERAL TEAMSTERS, CHAUFFEURS, AND HELPERS, LOCAL 470, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; TRUCK DRIVERS AND HELPERS, LOCAL

676, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; DELAWARE COUNTY LABOR RELATIONS ASSOCIATION; DELAWARE VALLEY LABOR RELATIONS ASSOCIATION; SCHUYLKILL VALLEY LABOR RELATIONS ASSOCIATION; PRIVATE CARRIERS ASSOCIATION; LOCAL CARTAGE OPERATORS ASSOCIATION; SOUTH JERSEY TRANSPORT ASSOCIATION, INC.

and Case No. 4-CE-8

JOSEPH T. WENDLING, An Individual

LOCAL 107, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INDEPENDENT

and Case No. 4-CC-267

S & E MCCORMICK, INC.

LOCAL 470, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INDEPENDENT

and Case No. 4-CC-268

S & E MCCORMICK, INC.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the Respondent Unions, the Respondent Associations, the Charging Parties and Counsel for the General Counsel, by and through their respective counsel, that:

1. All parties hereto waive a hearing before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's Decision.

2. This Stipulation, including the Exhibits, together with the Charges, Orders Consolidating Cases, Consoli-

dated Complaints and Notices of Hearing, Answers to Consolidated Complaints and Transcript of the abbreviated hearing held before Trial Examiner Reeves R. Hilton on November 26 and November 27, 1963, shall constitute the entire record herein and shall be filed with the Board.

3. All parties acknowledge timely receipt of the Charges, Orders Consolidating Cases, Consolidated Complaints and Notices of Hearing and Answers to Consolidated Complaints.

4. An "owner-operator" or an "owner-driver", which terms may be used interchangeably, is defined by the contract (Exhibits 1, a and b) and understood by all parties to be a person who owns either a truck-tractor or a truck-tractor and trailer and who leases the truck-tractor either with or without a truck-trailer to a carrier to be used for the transportation of various commodities by the Carrier under the authority of ICC or State Motor Authority, if any, and who then also drives and operates such equipment in the transportation of such commodities for the Carrier.

(a) Occasionally the owner-operator may provide a substitute driver to operate his equipment in the transportation of such commodities for the carriers.

5. A "fleet-owner" owns one or more truck-tractors, and leases such truck-tractors to one or more Carriers with or without drivers, for the purpose of transporting various commodities for the Carrier.

(a) The owner-operators and fleet-owners involved in these proceedings do not have permits, licenses, or certificates which authorize them to hold themselves out to the public as being in the transportation business in interstate commerce; accordingly, such fleet-owner and owner-operators may engage in transportation work in interstate commerce only for Carriers, or in the transportation of ICC exempt commodities.

6. The term "Carrier" means either a private, common or contract carrier as those terms are defined by the Interstate Commerce Act.

(a) Respondent Associations are comprised of eighty-four (84) member carriers engaged in the transportation of steel, heavy machinery, dry freight and household goods.

7. The Carriers named in Appendix A attached hereto were in a contractual or lease relationship with certain owner-operators, and the relationship of owner-operators to some of such Carriers under such contracts and leases, and in fact and in law, is that of independent contractor while the relationship of owner-operators to other of such Carriers, in fact and in law, is that of "employee" as defined in the Act.

(a) The contractual or lease relationship between the carriers named in Appendix A and owner-operators have been in existence for varying periods of time, from a minimum of two (2) years to a maximum of twenty-seven (27) years as set forth in Appendix A.

8. Some of the drivers of fleet-equipment which is leased to carriers with drivers, in the absence of the contractual provisions involved in these proceedings, are employees of the fleet-owner and some are employees of the carriers.

9. Counsel for the General Counsel, Delaware County Labor Relations Association, Delaware Valley Labor Relations Association, Schuylkill Valley Labor Relations Association, and Charging Parties aver that the Carriers named in Appendix A, with the exception of Carrier Cartage Co., Kulp and Gordon, Inc., Ragens Transportation Company, Robbins Motor Transportation and Salem Express, and the owner-operators and leased operators with whom they have lease agreements are in the relationship of independent contractors in fact and in law. Re-

spondent Unions, while agreeing that the relationship of owner-operators and fleet owner to some of the Carriers named in Appendix A is that of independent contractor, as to the relationship with specific Carriers, take the position this is a matter of proof under applicable laws.

10. The owner-operators involved in these proceedings are engaged in the transportation of steel, heavy machinery, dry freight and household goods. However, each of such owner-operators is not necessarily engaged in the transportation of each of such commodities.

11. The Carriers named in Appendix A also have their own employees driving carrier-owned equipment either in the transportation of steel, heavy machinery and dry freight or household goods, but each of such employees is not necessarily engaged in the transportation of each of such commodities.

12. The employees referred to above are represented for the purpose of collective bargaining by Respondent Unions under collective bargaining contracts negotiated with Respondent Employer Associations and their members. (Exhibits 1 a and b.)

13. (a) A number of the owner-operators, presently undetermined, who are in contractual or lease arrangement with the carrier named in Appendix A, are not members of any of the Respondent Unions.

(b) The contracts involved in this case and the work duties of employees under such contracts include the transportation of steel, heavy machinery, dry freight and household goods in intrastate and interstate commerce.

(c) The collective bargaining contracts between the parties hereto covering their employees for the term immediately prior to the effective date of the Agreements involved in these proceedings also included the transportation of steel, heavy machinery, dry freight, household goods, and contained, among other things, the contract

language attached hereto as Exhibit 2 (Article 1; Article 2, Section 3; Article 20; Article 21).

(d) Prior to the execution of the contracts involved in this case, none of the carrier-members of Respondent Associations were parties to any collective bargaining agreements with any of the Respondent Unions containing provisions pertaining to owner-operators similar to the owner-operator clauses involved in these proceedings, except as the Union avers may be contained in the attached agreements, Exhibits 3(a) to 3(c). Some of such carriers were parties to contracts containing the same or similar owner-operator clauses with other unions in other sections of the country where they are engaged in the trucking business, as follows:

Wilson Freight Forwarding Co., Kowalsky Express Service and Lobiondo Brothers Motor Express, Inc.

(e) Drivers who are qualified to drive equipment used in the transportation of dry freight and general commodities are also qualified to drive equipment used in the transportation of steel and heavy machinery and, if physically qualified, should be qualified to perform drivers' duties with respect to the latter after instruction as to the handling of the specific commodity.

(f) Some drivers of carriers may be assigned to the transportation of steel, heavy machinery or dry freight interchangeably.

14. The contract clauses involved in the instant case are similar to the contract clauses which have been negotiated by affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in the various areas and cover the approximate number of Employers, Unions, and employees, indicated below.

(a) CENTRAL STATES OVER-THE-ROAD MOTOR FREIGHT AGREEMENT [Michigan, Ohio, Indiana, Illinois, Wisconsin,

Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas, Kentucky, West Virginia] 1,800 Employers; 95 Unions; 40,000 employees.

(b) SOUTHERN CONFERENCE OVER-THE-ROAD MOTOR FREIGHT AGREEMENT [Arkansas, Louisiana, Oklahoma and Texas] 150 Employers; 19 Unions; 10,000 employees.

(c) SOUTHEASTERN AREA OVER-THE-ROAD MOTOR FREIGHT AGREEMENT [Alabama, Florida, Georgia, Mississippi and Tennessee] 124 Employers; 13 Unions; 7,000 employees.

(d) WESTERN CONFERENCE OVER-THE-ROAD MASTER AGREEMENT [Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming, and El Paso, Texas] 1,662 Employers; 99 Unions; 38,000 employees.

(e) CAROLINA FREIGHT COUNCIL OVER-THE-ROAD AGREEMENT [North Carolina and South Carolina] 68 Employers; 5 Unions; 5,000 employees.

(f) VIRGINIA FREIGHT COUNCIL OVER-THE-ROAD AGREEMENT 60 Employers; 4 Unions; 1,700 employees.

(g) WESTERN PENNSYLVANIA MOTOR CARRIERS ASSOCIATION 75 Employers; 12 Unions; 1,750 employees.

(h) WEST VIRGINIA FREIGHT COUNCIL OVER-THE-ROAD AGREEMENT 29 Employers; 3 Unions; 825 employees.

(i) CENTRAL PENNSYLVANIA MOTOR CARRIERS OVER-THE-ROAD AGREEMENT 110 Employers; 5 Unions; 6,000 employees.

(j) MARYLAND—DISTRICT OF COLUMBIA FREIGHT COUNCIL OVER-THE-ROAD AGREEMENT 150 Employers; 4 Unions; 1,500 employees.

(k) NEW YORK STATE TEAMSTERS OVER-THE-ROAD AND LOCAL CARTAGE FREIGHT AGREEMENT 124 Employers; 12 Unions, 10,000 employees.

(l) BEDFORD, PENNSYLVANIA AREA LONG HAUL AGREEMENT 7 Employers; 1 Union; 650 employees.

(m) HARRISBURG, PENNSYLVANIA RELAY AGREEMENT 5 Employers; 1 Union; 265 employees.

(n) NEW ENGLAND FREIGHT AGREEMENT [Massachusetts, Connecticut, Rhode Island] 100 Employers; 16 Unions; 1,300 employees.

(o) MAINE FREIGHT AGREEMENT 12 Employers; 1 Union; 400 employees.

(p) NEW HAMPSHIRE GENERAL TRANSPORTATION AGREEMENT 22 Employers; 1 Union; 880 employees.

(q) VERMONT GENERAL TRANSPORTATION AGREEMENT 5 Employers; 1 Union; 200 employees.

(r) NEW JERSEY—NEW YORK GENERAL TRUCKING AGREEMENT 833 Employers; 12 Unions; 25,000 employees.

(s) M. T. L. R. ROAD AND CITY CARTAGE AGREEMENT [Philadelphia, Pennsylvania; Camden, New Jersey; Wilmington, Delaware] 254 Employers; 6 Unions; 10,000 employees.

(t) TRI-AREA LABOR ASSOCIATION AND INDEPENDENT ASSOCIATIONS ROAD AND CITY CARTAGE AGREEMENT [Philadelphia, Pennsylvania; Camden, New Jersey; Wilmington, Delaware] 84 Employers; 6 Unions; 2,000 employees.

(u) MANY LOCAL CARTAGE AGREEMENTS.

(v) Most Carriers operating in the areas covered by the above listed agreements operate under the contract clauses similar to those in the instant case; however, some smaller carriers do not.

15. A substantial number of Carriers and drivers, including owner-operators, covered by the above Agreements operate into and out of the area covered by the Agreements involved in this litigation, and a substantial number of Carriers and drivers, including owner-operators, covered by Agreements involved in this proceeding operate into some of the areas covered by the Agreements referred to above.

16. Respondent Unions subject to the objections reserved in paragraph 16 (A) below, would present the following testimony through witnesses as to the circumstances and object of the negotiations of the challenged clauses:

(a) The first such Agreement containing provisions relating to owner-operators appeared in the CENTRAL STATES AREA OVER-THE-ROAD MOTOR FREIGHT AGREEMENT for the period starting October 1, 1938 to October 31, 1939, and such provisions have appeared continuously in such Agreement, with amendments from time to time, down to the present time *(Local 24* v. *Revel Oliver,* 358 U.S. 283, hereinafter cited as *Oliver.)*

(b) The minimum lease contract rates which appear in Section 12 of Article 24 of Exhibit 1(b) resulted from surveys made by Unions and Carriers with regard to the cost of operation of leased equipment under other contracts in other areas and referred to in *Oliver.* Such rates have been increased from time to time to keep up with what the unions claim was the increased cost of operations and those rates were not intended to give to the owner-driver a profit for the use of his equipment. However, owner-drivers are free to negotiate lease rental rates which are in excess of the minimums established by the Agreement, and it is common for them to do so. *(Oliver)*

(c) Such minimum rental rates apply only to the equipment which an owner-driver leases to a Carrier and which the owner-driver drives himself in the transportation of commodities for such Carrier. *(Oliver)*

(d) Article 1, Section 2 and Article 23 of the collective bargaining agreement (Exhibit 1 a) before the Board in this case are essentially the same contract clauses which were before the United States Supreme Court in the case of *Local 24* v. *Revel Oliver,* 358 U. S. 283, and the statements contained in the Record and in the Opinion of the Court in that case accurately set forth the reasons, intent,

purposes and motive for the negotiation of such contract clauses by the Respondent Unions. *(Oliver)*

(e) The Union negotiated the Article to prevent undermining of the negotiated drivers' wage scale resulting from the practice of Carriers of leasing a vehicle from an owner-driver at a rental which returned to the owner-driver less than his actual costs of operation, so that the driver's wage received by him, although nominally the negotiated wage, was actually a wage reduced by the excess of his operating expenses over the rental he received. *(Oliver)*

(f) The Carriers and the Union have disputed since 1938 the terms of a Carrier's hire of a lessor's driving services with his leased vehicle. *(Oliver)*

(g) The usual lease is by the owner of a single vehicle who hires out his services as driver with his vehicle. *(Oliver)*

(h) The nub of the Union's position since 1938 has been that the Carriers abuse the leasing practice, particularly by paying inadequate rentals for the use of leased vehicles, with the result that part of the men's wages for driving was being used for the upkeep of their vehicles. . . . The Union's demands for contract provisions relating to owner-operators were designed also to secure a living wage for the lessor plus an adequate rental for his equipment. *(Oliver)*

(i) A minimum rental clause first appeared in the 1938 agreement which also contained provisions comparable to Sections 8, 10 and 14 of present Article 23, (Exhibit 1a). In 1939, after the Union claimed that "there were a lot of people that were transferring their title into other people's name to avoid the conditions of the contract", Section 3 was added to provide that "certificate and title to the equipment must be in the name of the actual owner." When the dispute brought the parties to

the verge of a strike in 1941, the note to Section 1 and Sections 13, 15, 16, 17 and 18 came into the agreement. *(Oliver)*

(j) In 1946 the Union demanded agreement from the Carriers to abolish the leasing practice claiming the Carriers were taking advantage of certain provisions of the contract. This demand was compromised by the addition of Section 19 restricting leasing to Carriers who will agree to submit all grievances pertaining to owner-operators to joint Employer-Union grievance committees in each respective state; the section represented the compromise between the union position that it should abolish all owner-operators and the Carriers' contention there should be no limitation. *(Oliver)* Section numbers referred to in subparagraphs (i) and (j) are the same section numbers which appear in Articles 23 and 24 in Exhibits 1(a) and 1(b) respectively.

(k) The Union also urged in support of its contract demands relating to Owner-operators that the inadequacy of a rental which means that the owner-operator makes up his excess costs from his driver's wages would result in the progressive curtailment of jobs through withdrawal of more and more Carrier-owned vehicles from service. *(Oliver)*

(l) The purpose and intent of the contract clauses in question is to preserve work covered by the contracts in evidence as Exhibits 1(a) and 1(b), to employees within the collective bargaining unit. (Article 1, Section 2; Article 23, Sections 1 and 4 of Exhibit 1(a); *Local 24* v. *Revel Oliver,* 358 U. S. 283 at 298).

(m) Drivers of fleet-owned equipment are also required to become employees of the Carrier under the provision of the Agreements. However, the lease rental rate which the Carrier pays to the fleet-owner for the use of his equipment is subject to negotiation between the

fleet-owner and the Carrier, and is not in any way regulated by the contract. *(Oliver)*

(n) The reason and object for requiring that all drivers of leased equipment including drivers of fleet-leased equipment become employees of the Carrier is the same as that relating to owner-operators, that is, to assure the payment of negotiated drivers' wages and to assure that work covered by the collective bargaining agreement be performed only by employees covered by the collective bargaining agreement. *(Oliver)*

(A) Counsel for the General Counsel, Respondent Associations and the Charging Parties object to the testimony referred to in paragraph 16(a) through (n), above, because it is irrelevant, immaterial or conclusionary in nature.

17. The demand for the inclusion of the articles which are involved in this proceeding arises out of a dispute between Respondent Unions and the Carriers, and the Unions would present testimony that it was not for the purpose of compelling owner-operators or the drivers of fleet equipment to join Respondent Unions, but acknowledges such would be the necessary result.

18. These proceedings involve only those owner-operators or fleetowners and fleet equipment drivers as to whom the Employer-employee relationship with the carrier does not apply, but as to whom the contract would establish such Employer-employee relationship.

19. Respondent Unions have entered into agreements substantially the same as those involved herein with Motor Transport Labor Relations, Inc., on behalf of the Carriers which Motor Transport Labor Relations, Inc., represents. By Agreement between the Respondent Unions, Motor Transport Labor Relations, Inc., and the Employer Associations involved in these proceedings, there has been created a single multi-employer unit covering the em-

ployees of all Local Cartage and Over-the-Road Operations of all Employers represented by such Employer Associations. The agreement with Motor Transport Labor Relations, Inc., and the recent certification of Respondent Unions as bargaining agents for Motor Transport Labor Relations, Inc., employees are attached hereto as Exhibits 4 and 5 respectively.

20. During the early stages of the negotiations of the collective bargaining contracts (Exhibits 1(a) and (b)), the Respondent Employers' Associations opposed the inclusion of the provisions involved in this proceeding and on February 12, 1963 charges were filed by A. Duie Pyle, Inc., A. E. F. Interstate Transportation Service, Moon Carrier and Cross Transportation Co., Cases Nos. 4-CC-237, 238, 239, 240, against some of Respondent Unions alleging violations of Sections 8(b)(4)(ii)(A) and (B) concerning the provisions involved in this proceeding. The charges were dismissed by the Regional Director for the Fourth Region on April 22, 1963 (Exhibit 6). During the negotiations the Respondent Employers' Associations offered to include in the agreement contractual guarantees that no employee drivers presently employed would be deprived of employment or work because of the utilization by any Carrier of owner-operators.

21. In the course of their operations, a few of the carriers named in Appendix A have used and do use owner-operators to perform certain over-the-road driving functions from specified origins to specified areas or destinations. Employees of those carriers have been used to perform such work only on those relatively few occasions when owner-operators were not available or when there was an overflow of such work.

The parties hereby request that the Board set a time for the filing of briefs. Within such period as may be granted by the Board, any party hereto may file with the Board in Washington, D. C., an original and six copies of a brief in support of their position and, immediately

upon such filing, shall serve a copy on each of the other parties. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose. Requests for such leave shall be in writing and a copy shall immediately be served on each of the other parties. Should any party desire permission to argue orally before the Board, the request therefor must be made in writing to the Board simultaneously with the filing of the aforementioned briefs, with proof of service on all other parties furnished with such request. The Board shall notify the parties of the time and place of oral argument if such permission is granted.

This Stipulation is made without prejudice to any objection that any party may have as to the materiality or relevancy of any facts or the competency of any conclusions stated herein.

It is further stipulated and agreed that if for any reason this Stipulation shall not be signed by all parties hereto, this Stipulation shall be null and void for all purposes and shall not be offered or received in evidence in any proceeding.

This Stipulation is entered into for the purpose of this proceeding only, and shall not be used in any other proceeding as an admission or admissions against any of the Respondents herein.

IN WITNESS HEREOF, the parties hereto have caused this Stipulation to be executed by the duly authorized representatives on the date set forth opposite their names.

LOCAL UNIONS 107, 312, 331, 384, 470 and 676, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

By

Date Executed:

DELAWARE COUNTY LABOR RELATIONS ASSOCIATION
DELAWARE VALLEY LABOR RELATIONS ASSOCIATION
SCHUYLKILL VALLEY LABOR RELATIONS ASSOCIATION

By

Date Executed:

PRIVATE CARRIERS ASSOCIATION
LOCAL CARTAGE OPERATORS ASSOCIATION
SOUTH JERSEY TRANSPORT ASSOCIATION, INC.

By

Date Executed:

S & E MCCORMICK, INC.

By

Date Executed:

PETER D. WALTHER

By

Date Executed:

JOSEPH T. WENDLING

By

Date Executed:

GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD

By

Counsel for the General Counsel
National Labor Relations Board
Fourth Region

Date Executed:

LIBRARY
SUPREME COURT U. S.

Office-Supreme Court,
FILED
JAN 8 1968
JOHN F. DAVIS; CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 888

LOCALS 107, 312, 331, 384, 470, AND 676 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

A. DUIE PYLE, INCORPORATED, A. E. F. TRANSPORTATION, INCORPORATED, AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

DAVID PREVIANT,
211 West Wisconsin Avenue,
Milwaukee, Wisconsin 53203,
Counsel for Petitioners.

Of Counsel:
EDWARD DAVIS,
215 South Broad Street,
Philadelphia, Pennsylvania,
FLORIAN BARTOSIC,
25 Louisiana Avenue, N. W.,
Washington, D. C. 20001,
JOHN S. WILLIAMSON, JR.,
ALAN M. LEVY,
211 West Wisconsin Avenue,
Milwaukee, Wisconsin 53203.

THE GUNTHROP-WARREN PRINTING COMPANY, CHICAGO 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 888.

LOCALS 107, 312, 331, 384, 470, AND 676 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

A. DUIE PYLE, INCORPORATED, A. E. F. TRANSPORTATION, INCORPORATED, AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

I. THE STIPULATED RECORD IS SUFFICIENT TO SUPPORT THE GRANTING OF CERTIORARI.

The National Labor Relations Board agrees that the court below erred in holding the contract clauses in question in violation of Section 8(e) of the Act. But it believes "in view of the stipulated record" this is not "an appropriate case for review."

This is a curious position. This is the same record to which its General Counsel stipulated with all the parties. It is the same record which the Board found sufficient to support its own Decision and Order. It is the same record which the Board found sufficient to support its request for affirmance by the Court of Appeals. Indeed, it is the same record which the court below found sufficient to support its reversal of the Board on the merits.[1]

Nor does the Board now suggest any possible aspect of the record which may be inadequate or any additional facts or testimony which may be helpful to the Court in considering this case.

It is respectfully submitted that the record supports the Board's Decision and Order, and is more than adequate to support the granting of the Petition. This case does not present a single question of fact. The only issue in dispute is the legality of certain contract language. Clearly, the record is sufficient to support a decision of that question.

This matter, of crucial importance in the administration of the National Labor Relations Act, and to the collective bargaining relationship between Petitioners and the carriers, has now been in litigation for more than three years. Its final adjudication by this Court should not be further deferred.

---

1. At footnote 3 of its Brief the Board quotes the observation of the court below with respect to the record. That comment was directed to what the court called the "Union standards provision", which that court and the Employers agreed was lawful. (Pet. 8a; Er. Br. 8.) Therefore, the quotation of the court below to the stipulated record is not relevant to the issues before this Court. Moreover, the parties did stipulate with respect to the Union's purpose and intention; this stipulation quotes from this Court's first *Oliver* decision, 358 U. S. 283. (R. 32a-33a.)

II. THERE IS NO MERIT IN THE EMPLOYERS-RESPONDENTS' ARGUMENTS SUPPORTING THE DECISION BELOW.

The Employers-Respondents' (hereinafter Employers) Brief in opposition: (a) misstates the holdings in the *Oliver* decisions; (b) points up the extent to which the court below substituted its own judgment for that of the Union's concerning the necessity for certain contractual protections against subcontracting; and (c) relies on the error of the court below that the provisions in question are "Union standard provisions" designed to place non-unit drivers on an economic parity with unit drivers when, in fact, they are designed to prohibit the use of non-unit drivers and to protect the wages of those unit drivers who drive their own trucking equipment. (Pet. 8a.)

A.

Contrary to the Employers' statement that ". . . Article XXXII [at the time of *Oliver*] applied to an individual owner operator only when he was driving his own vehicle for a carrier . . ." (Br. 5), Article 32 then also provided "that hired or leased equipment, if not owner-driven [should] be operated only by employees of the certificated or permitted carriers . . ." *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 362 U. S. 605, at 605-06. Indeed, the fleet-owner question was the precise issue decided in the second *Oliver* case, where this provision was held to be lawful and primary. *Ibid.* at 606.

B.

The Employers argue (Br. 6) that the agreement not to subcontract "work or services presently performed or hereafter assigned to the collective bargaining unit", as well as the "elaborate language and procedures concerning economic conditions and negotiated rental and wage rates for owner-operators and fleet owners", demonstrates that the work which unit employees perform is protected. (Br. 7.) This argument, as the majority below acknowledged (Pet. 7a-8a), is fallacious; such contract language does not prevent the carriers from initially assigning new work to non-unit personnel.

More important, the Employers' argument is based on the same erroneous premise as the decision below: namely, that a union must, in a Section 8(e) proceeding, prove to a reviewing court's satisfaction the necessity for the contractual protections it seeks against subcontracting.

Even if it were true that Petitioners negotiated greater contractual protection against the erosion of unit work than was absolutely necessary, this would not demonstrate, as the court below seemed to think (Pet. 9a), a secondary objective, but, at most, an excess of caution in protecting its primary interest in preserving unit work. Moreover, here, where the Petitioners simply adopted, *in haec verba*, contract language which had long been incorporated in collective agreements throughout the trucking industry, and where, as recently as two years before Petitioners sought its adoption, there had been further diversions of unit work to non-unit personnel (R. 39a), the question of "necessity" is particularly inappropriate.

Undoubtedly, in Section 8(e) proceedings, a court, like the Board, must analyze contract language banning subcontracting to determine its purpose; but it cannot—without substituting its own judgment for that of the parties—

base a finding of secondary object on its belief that a bargaining unit can survive with a lesser amount of protection than its representative deems necessary. It is doubtful that a court has either the experience or the expertise to "second guess" unions on questions of appropriate contractual protections against subcontracting. In any event, there is no evidence that Congress, in adopting Section 8(e), intended to depart from the principle that the legality of contract provisions does not turn upon the Board's or Court's view of their necessity or their wisdom. *United States* v. *Hutcheson*, 312 U. S. 219 at 232; *NLRB* v. *American National Ins. Co.*, 343 U. S. 395, 404, 402; *NLRB* v. *Insurance Agents' Union*, 361 U. S. 477 at 490.

C.

The Employers characterize the requirement that only employees may perform unit work as " a Union signatory clause" (Br. 9) and echo the decision below (Pet. 9a) that the provisions for wages and working conditions "relate to independent contractors observing union standards." (Br. 8.)[2] This simply is not true; on the contrary, the requirement that the unit carriers use their employees exclusively to perform unit work absolutely prohibits them from using "independent contractors" to perform this work.

2. A "Union standards clause" is a clause that limits subcontracting "to employers maintaining labor standards commensurate with those required" under the parties' collective agreement; such clauses are lawful, valid, primary regulations. *District 9, International Association of Machinists* v. *NLRB* (D. C. Cir. 1962), 315 F. 2d 33, 36 at n. 6; *Orange Belt District Council of Painters No. 48* v. *NLRB*, 328 F. 2d 534; *Meat & Highway Drivers, Local 710* v. *NLRB*, 335 F. 2d 709, 713, 715. A "Union signatory clause" is a clause that further limits subcontracting to employers who have signed union agreements; such clauses are unlawful. *Meat & Highway Drivers, supra.*

Like any total ban on the subcontracting of unit work, the provisions do not interfere with the employer's right to expand and contract the work force as the necessities of business dictate. In the trucking industry the employer frequently meets this need by hiring drivers who bring with them their own trucks (the tools of their trade), which they lease to the carriers. The elaborate safeguards set forth in Article 23 (City Cartage Agreement) and Article 24 (Over-the-Road Agreement) are designed to prevent carriers from using lease arrangements to depress the wages of such driver-employees. See *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 358 U. S. 283 at 294. These safeguards do not change the fact that it is a total ban on subcontracting which is emphasized by the provision that only employees shall drive equipment (owned or leased) in the service of the employer.

The court below, because of its apparent failure to understand this, did not consider Petitioners' position that these clauses had two primary objectives: (1) to protect against a further loss of unit work to subcontractors; and (2) to require all unit work to be performed by unit employees. In fact, the requirement that all unit work be performed by unit employees encompasses both these primary objectives.

In sum, the Employers' Brief in Opposition highlights the misconceptions on which the decision below is based.

The Employers, of course, cannot dispute the importance of the case.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID PREVIANT,
211 West Wisconsin Avenue,
Milwaukee, Wisconsin 53203,
Counsel for Petitioners.

Of Counsel:

EDWARD DAVIS,
215 South Broad Street,
Philadelphia, Pennsylvania,

FLORIAN BARTOSIC,
25 Louisiana Avenue, N. W.,
Washington, D. C. 20001,

JOHN S. WILLIAMSON, JR.,
ALAN M. LEVY,
211 West Wisconsin Avenue,
Milwaukee, Wisconsin 53203.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 888

LOCAL 107, ETC., affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONERS

v.

A. DUIE PYLE, INCORPORATED, ET AL., and NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The collective bargaining agreement between the petitioner unions and a group of motor common carriers contains a clause providing that, where the carrier hires or leases the equipment of "owner-oper-

ators" and "fleet-operators," [1] the equipment shall be operated by an "employee" of the carrier who "shall be paid pursuant to the terms of this Agreement," and the carrier shall have "the right to control the manner, means and details of, and by which the owner-operator performs his services, as well as the ends to be accomplished" (Pet. App. 23a). The effect of this clause is to permit the carrier to do business only with owner-operators and fleet-operators whose drivers, while performing services for the carrier, are employees of the carrier and thus subject to the provision in the union's collective agreement with the carrier requiring union membership as a condition of continued employment (see Pet. App. 36a). The question presented is whether this clause is covered by the prohibition in Section 8(e) of the Act against a labor organization and an employer entering into agreements by which the latter agrees "to cease doing business with any other person" (Pet. App. 55a).

The Board found that the basic purpose of the clause was "to protect unit work and standards against erosion from subcontracting that might allow the same work to be performed under terms and conditions of employment less favorable than those prescribed in the Union's collective-bargaining agree-

---

[1] An owner-operator owns a truck-tractor, or a tractor-trailer combination, leases this equipment to a carrier, and drives the vehicle himself. A fleet-operator owns one or more such vehicles and leases them to a carrier either with or without drivers. (Pet. App. 18a).

ment," and that the clause had "a legitimate primary object and [was] not aimed at achieving secondary objectives tied to union interests outside the unit that Section 8(e) is designed to prevent" (Pet. App. 33a-34a).[2] The court of appeals ruled that, on their face, the requirements in the clause "are 'secondary' in their purpose as well as their result," since they "do not require a carrier to put an end to subcontracting, but only to terminate it as to subcontractees who refuse to become members of the union" (Pet. App. 8a-9a). The court further held that the evidence in the record was insufficient to show that the clause did not have a secondary object (see Pet. App. 10a).[3] Accordingly, it set aside the Board's dismissal of the unfair labor practice complaint *(ibid.)*.

Although the Board believes that the court of appeals erred in holding that the clause had a secondary objective and thus violated Section 8(e) of the Act, it did not file a petition for a writ of certiorari. The Board believes that, in view of the stipulated rec-

---

[2] See *National Woodwork Manufacturers Ass'n.* v. *National Labor Relations Board*, 386 U.S. 612; *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283.

[3] The court noted that, since "the Board decided the present case on a stipulation of facts, the record is neither as complete nor as satisfactory as it might be" (Pet. App. 8a).

ord, this would not be an appropriate case for seeking further review of this issue.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

National Labor Relations Board.

JANUARY 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 286013 521